COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2016/CLE/qui/01564

IN THE MATTER of **ALL THOSE** pieces parcels or lots of land situate at "*Signal Point*" also known as "*Sumner Point*" on the Island of Rum Cay one of the Islands of the Commonwealth of The Bahamas and designated Lots 2, 3, 5, 9 and 10.

AND IN THE MATTER of the Quieting Titles Act, 1959.

IN THE MATTER of the Petition of Scott E. Findeisen and Brandon S. Findeisen (as Trustees of the Stephen A. Orlando Revocable Trust).

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Timothy Eneas QC with him Ms. Knijah Knowles for the Petitioners
Ms. Kenrea Smith for the Adverse Claimant, the Minister responsible for Crown Lands

Hearing Dates: 11, 12, 13, 14 March 2019, 10, 11, 12 March 2020, 29 May, 4 June 2020, 2 February 2021, 28 September 2021

JUDGMENT

Civil – Quieting titles proceedings – Quieting Titles Act, 1959, Ch. 393 – Whether the Petitioners have documentary title – Whether a claim under the Quieting Titles Act requires a good root of title – Whether the Petitioners have possessory title – Whether the Petitioners own adjoining land by the doctrine of accretion – Whether the Crown is estopped from asserting its strict legal title where it previously acknowledged that the land was not Crown land – Whether the land excheated to the Crown

The Petitioners are the Trustees of the Stephen Orlando Revocable Trust. They filed a Petition on 23 November 2016 by which they claim to be the owners of 5 lots of land ("the Lots") situated in Rum Cay, one of the islands within the Commonwealth of The Bahamas.

The Petitioners claimed to be the successors in title to the owners of an 80 acre tract by virtue of documentary as well as possessory title. The Lots stem from a Crown Grant in

favour of William Sumner dated 11 December 1806 and subsequently commuted to the said William Sumner. In addition to the 80 acre tract, the Petitioners claim to be successors in title to portions of a 15 acre tract which adjoins the 80 acre tract. They contend that the 15 acre tract developed naturally overtime by accretion. By that doctrine, they claim title to those portions of the Lots comprising a part of the 15-acre tract.

Initially there were two Adverse Claimants to the Lots, Wahoo and the Crown. The Adverse Claim filed by Wahoo was struck out of the action by Order of the Court dated 27 March 2020.

During the course of the proceedings, the Crown claimed that it did not dispute the Petitioners' ownership of those portions of the Lots situate within the 80 acre tract but it nevertheless resisted both the documentary and possessory claims of the Petitioners to a title to the lots within the 80 acre tract. With respect to the 15 acre tract, the Crown denied that the land developed over time. Instead, they averred that the land always existed and is crown land.

HELD: finding that the Petitioners have documentary and possessory title to those portions of the Lots within the 80 acre tract and that they are entitled to the remaining portions of the Lots within the adjoining 15 acre land by the doctrine of accretion

1. At common law as applied in the Bahamas, which have not adopted the English Land Registration Act, 1925, there is no such concept as an "absolute" title. Where questions of title to land arise in litigation the court is concerned only with the relative strengths of the titles proved by the rival claimants: per Lord Diplock in **Ocean Estates Ltd v Norman Pinder** [1969] 2 A.C. 19 at page 25 and **Strachan & Others v Camperdown Holdings Limited** SCCivApp. No.224 of 2014 referred to.

2. The effect of a Commutation is to certify the ownership of the land - Quit Rent Commutation Act, 1864. Therefore, I see no reason why a claim to documentary title (especially in quieting proceedings, the purpose of which is to validate a defective claim) cannot be based on a Commutation. From the evidence, it is clear that the Commutation was premised on the William Sumner Grant, the intention that the Commutation and the documents that followed were based on the William Sumner Grant is relevant.

3. While the documentary title relied upon by the Petitioners may not be perfect, it does, however, reflect a clear unbroken chain of conveyances extending over a period in excess of 160 years originating from the William Sumner Crown Grant of 80 acres and ultimately the conveyances of the subject lots to the Petitioners. On a balance of probabilities, the Petitioners have established that they are the owners of the lands described in Parcel A.

4. William Sumner and his successors in title have occupied the Lots, the subject of this Petition, since the Commutation in 1847. They had peaceful and uninterrupted possession for over 100 years. No one has objected or challenge their possession until shortly before the commencement of these proceedings. They have therefore established the requisite factual possession and *animus possidendi* for a possessory title: see **Powell v McFarlane** [1977] 38 P & CR 452, at 470 and **J.A. Pye (Oxford) Ltd and another v Graham and another** [2002] UKHL 30.

5. There was a wealth of evidence from as early as 1996 where surveyors expressed that the 15 acre tract was accreted land. There is scientific evidence to prove that accretion was possible and likely.

6. Even if the Court were wrong to come to the above findings, based on the doctrine of proprietary estoppel, the Crown is estopped from asserting its strict legal rights to ownership having regard to its conduct during the period 1977 to the commencement of the proceedings.

7. Even though it appears that the issue of escheat was an afterthought by the Crown, the law is clear: the operation of the doctrine of escheat is not automatic and requires an order of the court under the provisions of the Escheat Act before an escheat can take effect: see **Cunningham v Broadcasting Corporation of The Bahamas** SCCivApp & CAIS No. 168 of 2014.

8. The Petitioners are entitled to a Certificate of Title in respect of the 5 Lots designated lots 2, 3, 5, 9 and 10 situate at "*Signal Point"* also known as *"Sumner Point"* on the Island of Rum Cay, one of the Islands of the Commonwealth of The Bahamas.

JUDGMENT

Charles J:

Overview

[1] This is a Quieting Petition made pursuant to section 3 of the Quieting Titles Act 1959, Ch. 393 ("the QTA"). It concerns 5 lots of land designated lots 2, 3, 5, 9 and 10 on the Island of Rum Cay. Portions of lots 5, 9 and 10 are situate on an 80 acre parcel which was granted to William Sumner by Crown Grant in 1806 ("Parcel A") with the remaining parts of those lots together with lots 2 and 3 being situate on an adjoining 15 acre tract ("Parcel B") (together "the Lots" or "the property"). The Crown does not dispute the Petitioners' claim to the portions of the property situate on Parcel A but disputes the Petitioners' claims insofar as they relate to the portions of the property situate on Parcel B.

[2] On 23 November 2016, Scott E. Fendeisen and Branden S. Fendeisen ("the Petitioners") filed the present Petition supported by a verifying affidavit, an Abstract of Title and a Plan claiming documentary and possessory title of the Lots in their capacities as Trustees of the Stephen Orlando Revocable Trust. A Re-Amended Abstract of Title was filed on 11 March 2020.

[3] At the outset, there were two Adverse Claimants: the Wahoo Foundation and the Crown. After the Foundation closed its case on 10 March 2020, the Court requested the Petitioners and the Foundation to provide written submissions relative to the issue of whether the Foundation has sufficient standing to maintain an adverse claim in the proceedings. In a written Ruling delivered on 27 March 2020, the adverse claim of the Foundation was dismissed leaving the Petitioners and the Crown as the remaining competing parties.

[4] The Petitioners refer to Parcel A as the 80 acre tract (actually measured at a little more than 80) granted to William Sumner and Parcel B refers to a 15.143 acres of land which they contend has developed by accretion. They claim to be the owners of the Lots by documentary as well as possessory title asserting a documentary title by an unbroken chain of documents from the 1806 Crown Grant.

[5] The Petitioners say, that the Lots which they claim, comprise part of the Crown Grant originally granted to William Sumner for 80 acres of land in 1806 and subsequently commuted to William Sumner on 17 April 1847 ("the Commutation"). The property comprising the Commutation, comprised of 80 acres, and was bounded on its Southwestern boundary by the sea ("the Commuted Land").

[6] The Petitioners further assert that between the years 1847 and 1970, the Southwestern boundary to the Commuted Land was naturally enlarged as a result of accretion. They relied on a survey done in 1977 by Leonard Chee-A-Tow ("Mr. Chee-A-Tow"), a land surveyor, who identified the enlargement said to be the result of natural accretion possibly due to prevailing weather conditions over the years. Mr. Chee-A-Tow calculated the total acreage of the Commuted Land to be

95.809 acres in 1977 comprising 80.666 acres (Parcel A) and 15.143 acres (Parcel B). The Petitioners contend that Parcel B, by operation of the doctrine of accretion, belonged to their predecessors in title as the owners of Parcel A.

[7] Further, the Petitioners allege that the Commuted Land was in continuous and exclusive possession of William Sumner prior to 1847 and following him, members of the Sumner family up until 1954 and, during that time, no other person has made any formal claim to the Lots save for these proceedings.

[8] The Petitioners acknowledged that the documentary title is not perfect but they say that it reflects a clear and unbroken chain of conveyances over a period of more than 160 years. The Petitioners say that the documentary title together with the possessory title establish that, on a balance of probabilities, they are the owners of the Lots.

The legal framework

Role of the Court

[9] In **Stephen Henry Johnson v Eleuthera Land Company Limited** SCCIvApp. No. 96 of 2019, Judgment delivered on 18 March 2020, our Court of Appeal upheld the decision in **IN THE MATTER OF the Petition of Eleuthera Land Company Limited** 2012/CLE/qui/00579. In that Judgment, this Court likened the role of the court to that of an investigator quoting extensively from a previous judgment of a differently constituted Court of Appeal in **Strachan & others v Camperdown Holdings Limited** SCCivApp. No. 224 of 2012. For present purposes, I shall restate what I stated at paras. 10 to 11 of **Eleuthera Land Company Limited** [supra] namely:

> **"[10] The Petition is brought pursuant to section 3 of the Act which provides as follows:**
>
> > **"Any person who claims to have any estate or interest in land may apply to the court to have his title to such land investigated and the nature and extent thereof determined and declared in a certificate of title to be granted in accordance with the provisions of the Act."**

[11] It is plain from section 3 that the role of the court is that of an investigator. In Strachan & others v Camperdown Holdings Limited SCCivApp. No. 224 of 2012, our Court of Appeal gave some guidance on the court's role. In delivering the judgment of the Court, Crane-Scott JA, put it this way at paras [13] to [22]:

> **"13 In a recent decision of this Court (differently constituted) in the consolidated appeals of Bannerman Town, Millars and John Millars Eleuthera Association et al v. Eleuthera Properties Ltd SCCivApp Nos: 175,164 and 151 of 2014, it was held that the overriding principle which should guide a judge in quieting actions is:** *"simply to determine and declare which of the claimants has the better title".*
>
> **14 At paragraph 29 of its decision in Bannerman, the Court considered the Privy Council appeal from this jurisdiction in Ocean Estates Limited v. Norman Pinder [1969] 2 AC 19 in which, Lord Diplock explained:**
>
> > **"At common law as applied in The Bahamas which have not adopted the English Land Registration Act, 1925, there is no such concept as an "absolute title". Where questions of title to land arise in litigation the court is concerned only with the relative strengths of the titles proved by the rival claimants."**
>
> **15 It should also be said that while the court in quieting proceedings is tasked with determining and declaring which of the competing claimants to land has the better title, the court's role in the quieting process to be conducted under the Act is quite unique in that the court also functions as an investigator. Section 3 states:**
>
> > **"3. Any person who claims to have any estate or interest in land may apply to the court to have his title to such land investigated and the nature and extent thereof determined and declared in a certificate of title to be granted in accordance with the provisions of the Act."**
>
> **16 The investigatory role which the court is required to perform in the quieting process is buttressed by other provisions of the Act designed to publicize the proceedings with the aim of inviting the filing within such time as the court may specify of adverse claims (if any) for investigation by the court during the proceedings. Section 6 for example, mandates the court to direct notice of the proceedings to be published in the newspapers. Additionally, the court is required by section 7 of the Act to direct that notice of the proceedings be served on**

any person (known or unknown) who appears to have, *inter alia,* **an adverse claim in respect of the whole or any part of the land to be quieted.**

17 The relative informality of the investigatory exercise to be conducted under the Act *vis-à-vis* **other proceedings is most acutely seen in section 8 which permits strict rules of evidence to be dispensed with if the court is satisfied that the admission of evidence will assist the court in its task of investigating, determining and ultimately, declaring the true facts in relation to the question of title.**

18 Section 8 provides:

> **"8. (1)The court in investigating the title may receive and act on any evidence that is received by the court on a question of title, or any other evidence, whether the evidence is or is not admissible in law, if the evidence satisfies the court of the truth of the facts intended to be established thereby.**
>
> **(2) It shall not be necessary to require a title to be deduced for a longer period than is mentioned in subsection (4) of section 3 of the Conveyancing and Law of Property Act or...., or to produce or account for the originals of any recorded deeds, documents or instruments, unless the court otherwise directs.**
>
> **(3)The evidence may be by affidavit or orally or in any other manner or form satisfactory to the court."** *[emphasis added]*

19 When investigating the strength of a documentary title under the Act, the court will (in a manner not unlike a conveyancer) examine the abstract of title, *inter alia,* **to check that there is an unbroken chain of ownership on paper beginning with the owner in the root document and ending with the most recent owner. The investigation will also involve verification of the abstract by physical inspection of the original deeds and checks to discover whether there is evidence of occupiers who may adversely affect the documentary title claimed. See Halsbury's Laws of England, Volume 23 --Conveyancing: paragraph 139 - Investigation of Title: Unregistered Land.**

20 However, unlike the conveyancer, section 8 of the Act permits the Court in investigating title to land which is to be quieted, to receive and act on any evidence on a question of

> **title whether or not admissible in law, if the evidence satisfies the Court of the truth of the facts intended to be established.**
>
> **21 In short, while the Court must necessarily have regard to the documents or other evidence which is presented in support of a claim to a documentary title, section 8 allows for flexibility in the investigation process and expressly permits the Court to receive and to act upon <u>any</u> evidence on a question of title (whether or not ordinarily admissible in law) provided the Court is satisfied of the truth of the facts intended to be established.**
>
> **22 The objective of the Act is to provide a statutory mechanism for title to land in The Bahamas to be quieted through the Supreme Court. <u>To this end, the court's role under the Act is to fully investigate the claim (or claims), receive evidence with respect thereto, determine the truth of the facts intended to be established by the evidence and ultimately, act on and declare the ownership of the land on the basis of the evidence before it. The process is completed with the grant of a certificate of title to the person who, in the view of the court, has established title thereto. Where there are rival claims to the land to be quieted, the judge's primary function, following the investigation, as stated in Bannerman and Ocean Estates** *(above),* **is simply to determine and declare which of the claimants has the better title.</u>"** [Emphasis added].

[10] Further judicial reinforcement for the investigative role of the Court under section 3 of the Quieting Titles Act ("QTA") is the case of **Armbrister and others v Lightbourn and another** [2012] UKPC 40; Privy Council Appeal No. 0034 of 2010. At para [7], Lord Walker stated:

> **"[7] The purpose of the [Quieting Titles] 1959 Act is to provide a judicial process for the determination of disputes as to title to land in the Bahamas. The process is initiated by a petition presented by a claimant. The petition is advertised, and adverse claims may be made by rival claimants. The procedure is in the nature of a judicial inquiry and it ends in a judgment in rem which, subject to appeal, finally settles entitlement to the land, not merely as between the parties, but for all purposes. This judicial procedure meets an economic and social need in the Bahamas, where many of the outlying islands were, for much of the Commonwealth's history, sparsely populated and only sporadically cultivated. Much of the land belonged to landlords who were not permanently resident, and travel was slow. Parcels of land often had no clearly-defined boundaries based on comprehensive surveys…."**

[11] The Court must also be scrupulously vigilant against abuse of the statutory procedure. At para [7], Lord Walker summed it up this way:

> **"…But while the 1959 Act meets an economic and social need, there has also been a warning from a lecturer, familiar with the 1959 Act both as a legislator and as a practising member of the bar, that bench and bar must be vigilant to prevent the statutory procedure being abused by "land thieves" (the Hon Paul L. Adderley in an address to the National Land Symposium on 17 March 2001). It is no accident that the Judicial Committee has over the years heard many appeals raising questions of title to land in the Bahamas, including *Paradise Beach and Transportation Co Ltd v Price-Robinson*** [1968] AC 1072**, *Ocean Estates Ltd v Pinder*** [1969] 2 AC 19**, *Higgs v Nassauvian Ltd*** [1975] AC 464**, and *Higgs v Leshel Maryas Investment Co Ltd*** [2009] UK PC 47**."**

[12] Where a petition concerns a claim to title in fee simple, the Court must, on the completion of the investigation, declare one of the parties to the proceedings as having a better title. In **Ocean Estates Ltd v Norman Pinder** [1969] 2 A.C. 19, Lord Diplock said, at page 25:

> **"At common law as applied in the Bahamas, which have not adopted the English Land Registration Act, 1925, there is no such concept as an "absolute" title. Where questions of title to land arise in litigation the court is concerned only with the relative strengths of the titles proved by the rival claimants. If party A can prove a better title than party B he is entitled to succeed notwithstanding that C may have a better title than A, if C is neither a party to the action nor a person by whose authority B is in possession or occupation of the land. It follows that as against a defendant whose entry upon the land was made as a trespasser a plaintiff who can prove any documentary title to the land is entitled to recover possession of the land unless debarred under the Real Property Limitation Act by effluxion of the 20-year period of continuous and exclusive possession by the trespasser."** [Emphasis added]

Procedure under the QTA

[13] The procedure under the QTA is relatively informal. Section 4 requires the petition to be in the form set out in the Schedule and supported by the documents identified in the section. Section 8 permits strict rules of evidence to be dispensed with. It states as follows:

> **"(1)The court in investigating the title may receive and act on any evidence that is received by the court on a question of title, or any other evidence, whether the evidence is or is not admissible in law, if the evidence satisfies the court of the truth of the facts intended to be established thereby.**
>
> **(2) It shall not be necessary to require a title to be deduced for a longer period than is mentioned in subsection (4) of section 3 of the Conveyancing and Law of Property Act or..., or to produce or account for the originals of any recorded deeds, documents or instruments, unless the court otherwise directs.**
>
> **(3)The evidence may be by affidavit or orally or in any other manner or form satisfactory to the court."** [Emphasis added]

[14] Hearsay evidence is admissible. However, the Court will determine what weight, if any, is to be given to it. In the Privy Council case of **Kenneth McKinney Higgs and Another (Substituted for Clotilda Eugenie Higgs, Deceased) Appellants v Nassauvian Ltd Respondent** [1974] UKPC 24 at page 4, Sir Harry Gibbs said:

> **"…In part, this evidence was hearsay – a circumstance which, under the Quieting Titles Act 1959 (section 8 (1) did not render it inadmissible but which of course affected its weight…."**

[15] Section 3(3) and (4) of the CLPA is also important to the operation of section 8(2) of the QTA. It provides as follows:

> **"(3) Recitals, statements and description of facts, matters and parties contained in deeds, instruments, Acts or declarations, twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of truth of such facts, matters and descriptions.**
>
> **(4) A purchaser of land shall not be entitled to require a title to be deduced for a period of more than thirty years, or for a period extending further back than a grant or lease by the Crown or a certificate of title granted by the court in accordance with the provisions of the Quieting Titles Act, whichever period shall be the shorter."**

Documentary title by the Petitioners

[16] The Petitioner's Re-Amended Abstract of Title, filed on 11 March 2020, sets out their claim to the Lots in the following manner:

1. By a Crown Grant dated 11 December 1806, the Crown granted and conveyed to William Sumner 80 acres of land situate on Rum Cay ("the William Sumner Grant") which was commuted to William Sumner in 1847 ("the Commutation"). The payment of the quit rents and recording of the commutation is *prima facie* evidence of William Sumner's possession of the land up to the sea on the Southwestern boundary of the 80 acres parcel as identified in the Commutation.

2. By an Indenture of Conveyance dated 19 June 1860, John Pinder, Esquire Provost Marshal of the Bahama Islands sold to William Sumner's wife, Rachel Sumner, 20 acres of the 80 acres parcel comprising the Commuted Land. This 20 acres parcel was bounded on the Southwest by the sea. As at the date of this Indenture of Conveyance, William Sumner was deceased, as Rachel Sumner was described as his widow.

3. By an Indenture of Conveyance dated 11 July 1860, Rachel Sumner conveyed 5 acres of the 80 acres tract to Eliza Taylor in trust for Lennox Elgin Forsyth, a minor of Port Nelson, Rum Cay. This 5 acres parcel comprised the Southernmost tip or part of the 20 acres parcel. The remaining 75 acres remained vested in Rachel Sumner.

4. The Petitioners submit that, based on the description in this Indenture of Conveyance dated 11 July 1860, the remaining 60 acres of the 80 acres Commuted Land became vested in Rachel Sumner upon the death of her husband, William Sumner.
5. Rachel Sumner died in 1905 at the age of 86 and her interest devolved onto her eldest son, Peter James Sumner ("Peter"). Peter married Letissa Heptbourn ("Letissa") on 13 November 1910. By his Will, Peter left all his property, including his interest in property at Sumnerset or Sumner Hill, Rum Cay, to his wife Mena Letitia Sumner. It is believed that Letissa, whom he married, is Mena Letitia Sumner. Peter died on 23 October 1936, his

property vesting in Mena Letitia Sumner pursuant to a Deed of Assent dated 26 May 1937.

6. A 5 acre parcel adjoining the 75 acres and bounded on the West partly by the sea and partly by the property of Mena Letitia Sumner is said to have been in the exclusive possession of Evelyn Remilda Kelly and Castella Rachel Kelly from about the year 1924. According to the Petitioners, this parcel was described by Mr. Hubert Williams, the Petitioners' witness, deemed an expert in surveying and photogrammetry, as being situate within Parcel B.

7. By an Indenture of Conveyance dated 11 February 1954, Mena Letitia Sumner, Evelyn Remilda Kelly and Castella Rachel Kelly conveyed their right titles and interests in the 80 acres to Carl John Heyser Jr.

8. Two conveyances in similar form were executed by Evelyn Remilda Kelly and Castella Rachel Kelly in favour of Carl John Heyser Jr. on 11 February 1954 (collectively referred to as "the 1954 Conveyances"). Evelyn Remilda Kelly and Castella Rachel Kelly occupied a 5 acre portion of land, which the Petitioners say was on Parcel B.

9. By an Indenture of Conveyance dated 26 December 1958, Carl John Heyser Jr. granted and conveyed to Gail Grover Grant the property comprising 80 acres of land and by Indenture of Conveyance dated 13 May 1968, Gail Grover Grant conveyed to H & M Corporation Limited (now Sumner Point Properties Limited) ("the 1968 Conveyance").

10. By Indenture of Confirmatory Conveyance dated 28 January 1997, Stephen Orlando purchased lot 2 from Sumner Point Properties Limited. The Petitioners are the Trustees of the Stephen Orlando Revocable Trust and the successors in title to Stephen Orlando. Lots 5 was acquired by a conveyance in similar form on 18 August 1994 and lots 3,9 and 10 by a

conveyance dated 16 October 1998 (see items 39 to 44 of the Re-Amended Abstract of Title.

The Crown's objections to the Petitioners' documentary claim

[17] The Crown makes several objections to the documentary claim of the Petitioners. Essentially, they are as follows:

(i) The Commuted Land is not in the same location as that of the William Sumner Grant;

(ii) The description of the land used in the 1954 Conveyances and the 1968 Conveyance is materially different from the Commuted Land;

(iii) The Commutation is not a "good root of title".

[18] The Crown disputes the location of the William Sumner Grant and the Commuted Land from which the Petitioners establish their documentary title. On this basis, the Crown asserted that the documents relied on by the Petitioners to assert their documentary claim do not prove that the land being claimed is the same land from the William Sumner Grant. The Crown also objected to the documentary claim on the ground that the Commutation is not a good root of title.

[19] With respect to the Commutation, Learned Counsel Ms. Smith who appeared for the Crown, submitted that there is a marked difference between the descriptions in the William Sumner Grant and the Commutation. As such, she submitted that the Lots in the William Sumner Grant were not conveyed to him by Commutation. She next submitted that the Petitioners themselves admitted this difference in description in their Re-Amended Abstract of Title and in the Witness Statement of their expert, Hubert Williams ("Mr. Williams") when Mr. Williams stated that the Commutation is based on the land that was being possessed at that time. On this basis, Ms. Smith urged the Court to adjudicate only on the Crown Grant, as she says, it has not been extinguished by the Commutation since it does not describe the Petitioners' root of title.

[20] The Crown Grant describes the William Sumner Grant as being "*bounded Northwardly by that land that is allowed for the salt pond and on other sides by vacant land…*". In the Commutation, the 80 acres is described as being "*Bounded Northeasterly by land allowed for the Pond Southeasterly by land granted CR Nesbitts Southwesterly by the Sea and Northeasterly by vacant land and land granted C.R. Nesbitts.*"

[21] In his testimony, Mr. Williams sought to explain the difference arising from the Crown Grant and the Commutation. He said that the Commutation reflects what was in occupation at the time of the Commutation.

[22] Many early crown grants came with an obligation of the crown grantee to pay a quit rent to the Crown for the use of the land. The Quit Rent Commutation Act 1864 was enacted to facilitate the payment, collection and commutation of quit rents payable under the letters of certain crown grants. It provided for the commuting or freeing the land from the obligation to pay rent. Effectively, the legislation provided a framework for converting the land from leasehold to freehold.

[23] Although the Crown's witness, then Chief Surveyor, Mr. Thomas Ferguson ("Mr. Ferguson"), deemed an expert in surveying, mapping and valuation, initially forcefully asserted a significant variance between the location of the William Sumner Grant and the Commutation, under cross-examination by learned Queen's Counsel Mr. Eneas, who represented the Petitioners, Mr. Ferguson stated that the Commutation appears to be the same land that was originally granted to William Sumner because the dimensions and the geometry of the Commutation is the same as the geometry of the original grant, save for the coastline on the Southwestern boundary.

[24] In addition to the difference in description of the Lots between the Crown Grant and the Commutation, the Crown supported its contention that the property comprising the William Sumner Grant is not the land being claimed by emphasizing the difference in description used in the 1954 and 1968 Conveyances. According

to Ms. Smith, the description in the 1954 Conveyances and the 1968 Conveyance differs significantly from that in the William Sumner Grant and because of the variance, the Petitioners' Re-Amended Abstract of Title does not show a direct correlation to the land comprising the William Sumner Grant. Ms. Smith submitted that the hereditaments in the root of title describe the land sold by Mena Letitia Sumner as bounded on 2 sides by sea and one side partly by sea and partly by Crown land while the William Sumner Grant quite differently describes the property comprising the Grant as bounded on 4 sides by land.

[25] The 11 February 1954 Conveyance describes the Lots in the following way:

> **"ALL that piece parcel of tract of land known as "Sumner Point" and also known as "Signal Point" situate to the East of the said settlement of Port Nelson in the said Island of Rum Cay containing eighty (80) acres more or less and bounded as follows on the North by a salt pond on the East by the Sea on the South by the Sea and on West partly by the Sea and partly by Crown Land."**

[26] Ms. Smith also submitted that the description of the Conveyances is vague:

> **"ALL THAT piece parcel or tract of land situate at Signal Point also known as "Sumner Point" on the Island of Rum Cay another of the Islands in the said Commonwealth which said piece parcel of lot of land has such position shape marks boundaries and dimensions as are shown on the said plan."**

[27] Ms. Smith further argued that there is doubt in the description in the Petitioners' Conveyances as their root of title fails to describe at all the land the subject of the William Sumner Grant. It only sufficiently describes the land south of the William Sumner Grant which is the C.R. Nesbitt Grant. Therefore, says Ms. Smith, the descendants of William Sumner were actually resident and located outside the William Sumner Grant and on land south of the said grant, on the C. R. Nesbitt tract.

[28] Ms. Smith urged the Court not to overlook the incorrect description of the Commutation. She submitted that the law is clear that where the description of land is incorrect, the land is rejected. In that regard, she relied on the case of **Farrington**

and Estate Title Co. Ltd. v Harrisville Co. Ltd. [1971-6] 1 LRB 400. She further submitted that, in order to establish a good root of title, the description of the property must be recognizable: see **Stephen Henry Johnson v Eleuthera Land Company Limited** SCivApp No. 96 of 2019) where the 1954 Conveyances were not. She further relied on **Bannerman Town, Millars and John Millars Eleuthera Association v Eleuthera Properties Limited,** which referred to the learned authors of **Megarry and Wade's Law of Real Property** (4th ed.) for the meaning of a good root of title as:

> **"document which describes the land sufficiently to identify it, which shows the disposition of the whole legal and equitable interest contracted to be sold, and which contains nothing to throw any doubt on the title …"**

[29] However, Mr. Eneas QC urged the Court to have regard to extrinsic evidence, which he contended, establishes that the property referred to in the Provost Marshal Conveyance, the 1954 Conveyances and the 1968 Conveyance and all the other documents relied upon, is the very 80 acres of the William Sumner Grant. He submitted that the admissibility of extrinsic evidence to aid the construction of unclear descriptions is well-established. In support, Mr. Eneas cited the Bahamian Privy Council decision of **Anthony Armbrister** [supra], where the Board accepted the oral hearsay evidence of a witness as to the location of 15 acres of land. In delivering the Judgment of the Board, Lord Walker stated, at paras 44-47:

> **"44. The first point that has to be resolved is an issue as to the correct construction of the 1895 conveyance. The relevant part of the parcels clause (set out in full at para 16 above) refers to "85 acres of land . . . being part of a tract of land containing 100 acres granted to the said William Edward Armbrister by the Crown" and there is no doubt about the extent and location of that 100 acres. But exhibit 3 to the affidavit of the Registrar General shows that on the original conveyance plan the whole of the 100 acres was coloured pink. Mr Dingemans argues that that indicates that the grant must be understood as a grant of an 85/100ths undivided share. Ms Walton argues that it was intended as a grant of a separate 85 acres, with 15 acres being retained by William Armbrister, and that its location can be established by extrinsic evidence.**
>
> **45. The Board considers that the latter view is correct. The 1895 conveyance was plainly prepared by a skilled conveyancer. The**

draftsman knew how to describe an undivided share in land held as a legal estate, since in 1895 that was the nature of William Armbrister's interest in Freeman Hall: "one undivided moiety or half part of all that tract of land [etc]". Moreover it is impossible to imagine why William Armbrister, who was selling over 3,000 acres to the Sisal Company, should have wished to retain a small undivided share in the 100 acres, rather than choosing a particular site that he wished to keep in his personal ownership. The unusual right of occupancy for two months of the year that he retained in relation to the whole of the Village Estate and Newfield (together totalling over 2,500 acres) is not inconsistent with his wish to retain a particular area of 15 acres in his absolute ownership.

"46. The Board concludes that a mistake must have been made in the colouring of plan "A" on the 1895 conveyance. It is far too late for that mistake to be corrected by rectification, but where there is doubt or inconsistency as to the description of land in a conveyance, extrinsic evidence is admissible to resolve the difficulty. The principles were stated and applied by the House of Lords in Eastwood v Ashton [1915] AC 900 and by the Judicial Committee in Watcham v Attorney General of the East African Protectorate [1919] AC 533. The latter is a striking case on the facts, because of the large disparity (27 acres) between the stated acreage and the area of land as described by its boundaries; and the case shows that the admissible extrinsic evidence may include later events. During the twentieth century the Court's readiness to take account of extrinsic evidence has become stronger. Peter Gibson LJ said in Clarke v O'Keefe (2000) 80 P & CR 126, 133:

> **"It was said, as long ago as 1969, by no less an authority than Megarry J in Neilson v Poole (1969) 20 P & CR 909, 912, that the then modern tendency was towards admitting evidence in boundary disputes and assessing the weight of that evidence rather than excluding it. That tendency has, in my experience, not diminished in the intervening years."**

47. The tendency has not been restricted to boundary disputes, but extends to all issues as to the interpretation and effect of parcels clauses in conveyances. In Scarfe v Adams [1981] 1 All ER 843 the principle was well expressed by Griffith LJ (p 851):

> **"The principle may be stated thus: if the terms of the transfer clearly defined the land or interest transferred extrinsic evidence is not admissible to contradict the transfer. In such a case, if the transfer does not truly express the bargain between vendor and purchaser, the only remedy is by way of rectification of the transfer. But, if the terms of the transfer do not clearly define the land or interest transferred, then extrinsic evidence is admissible**

> **so that the court may (to use the words of Lord Parker in Eastwood v Ashton at [1915] AC 900 p 913) 'do the best it can to arrive at the true meaning of the parties upon a fair construction of the language used."**[Emphasis added]

[30] Mr. Eneas next submitted that the Sumner family's historic occupation of the 80 acre land in the Crown Grant together with the evidence that the 80 acres was situated near the bluff (referred to as the nipple by Hubert Williams) is evidence that the land described in the Crown Grant is the land in the 1954 and 1968 Conveyances. According to Mr. Eneas, the family's possession and the evidence as to the location of the 80 acres are consistent with the name "Sumner Point" used to describe the property in the 1954 Conveyances and the 1968 Conveyance. He contended that, having regard to the evidence, it is irrefutable that the descriptions in those conveyances were intended to refer to the property comprising the 80 acre tract granted and later commuted to William Sumner. According to him, the fact that the property described in the conveyances is actually larger than 80 acres does not invalidate the conveyance insofar as it purports to transfer the 80 acres. What is relevant is that the description in the said conveyances encompasses the 80 acres comprising the Crown Grant.

[31] Mr. Eneas further submitted that the 1954 Conveyances and the many intervening conveyances which use variants of the following description all evince a clear intention to transfer the land situate to the East of the settlement of Port Nelson in the said island of Rum Cay containing 80 acres more or less. The description of the 1954 conveyances undoubtedly includes Parcel A and Parcel B and possibly a part of the 80 acres situate to the Southeast of the 80 acre William Sumner Grant previously owned by C.R. Nesbitt tract of which 40 acres was conveyed to Captain William F. Dorsett in 1887.

[32] Mr. Eneas also relied on two maxims in support of his request for the Court to look beyond erroneous descriptions and give effect to the intention namely the maxims *falsa demonstratio non noce dummodo constet de re* (an erroneous description does not vitiate) and *ut res magis valeat quam pereat* (in deciding upon the effect

of a deed, the court will prefer a construction which gives effect to the intention of the parties). These maxims were explained in the House of Lords case of **Chalmers Property Investment Co Ltd v. Robson 2008 S.L.T 1069 (1967)** where Lord Gutherie held at page 5 of the report as follows:

> **"This case seems to me to be a clear example of the application of the maxim *falsa demonstratio non noce dummodo constet de re.* In *Trayner's Latin Maxims* at p218 the maxim is translated and explained thus: "*An erroneous description does not injure. Where the description is merely expository, an error in it will not vitiate, if there be no doubt as to the identity of the person or thing intended to be specified.*" The application of this principle is generally to be found in the interpretation of testamentary *1073 writings, but it is obviously equally applicable in dealing with contracts and dispositions of property. Authority for this view is to found in Dickson on *Evidence*, Vol II, ss 1070--1073. In ss 1070 and 1071 the learned author, in dealing with identification of the subject or of a person mentioned, refers to a "deed", and in s 1072 refers to "the obligation or bequest". *There is a general equitable principle in our law that the court will not allow the clear intention of parties disclosed in a deed to be defeated by a mere inaccuracy or mistake in expression. An example given by Lord Trayner of the application of the maxim is this: "A conveyance of 'my house in Queen Street occupied by AB' would be a good conveyance although the house was not occupied and had never been occupied by the tenant named." The maxim is, indeed, an illustration of the general rule that, in deciding upon the effect of a deed, the court will prefer a construction ut res magis valeat quam pereat. At p 56 of the same work Lord Trayner expressed it thus: "The contract or writing having been executed presumably with the view of having some effect, no construction of it will readily be adopted which would result in making it a dead letter. The intention of the parties will rather be sought for, and given effect to.*"**

[33] Mr. Eneas submitted that what is plain from the diagram shown on the Commutation and the legal description set out in the Commutation is that, at the time of the Commutation, the Southwestern boundary of the 80 acres tract granted to William Sumner was the sea. This was established by Mr. Williams.

[34] Both Mr. Eneas and Ms. Smith relied on the survey and survey report of Mr. Chee-A-Tow, prepared in 1977 at the instance of Robert Little ("the Chee-A-Tow Report"). Mr. Chee-A-Tow was commissioned to prepare a plan of the 80 acre William Sumner Crown Grant. He stated that he used the Commutation Plan as

his starting point for the survey. In paragraph 4 of his survey report, Mr. Chee-A-Tow said:

> **"When the rest of the boundaries were set out and pillared, Signal Point fell outside the tract as indicated on the diagram in Book A3 page 206 and in the C.R. Nesbitt Grant. There is evidence that parcel B was used as part of the tract as pasture – rock walls and fence posts formed such enclosures."**

[35] Ms. Smith relied on the Chee-A-Tow's Report to suggest that the 1954 and 1968 Conveyances (and the property which are the subject of this Quieting Petition) was not the land encompassed in the William Sumner Grant. She argued that the Chee-A-Tow Report reveals that the land described in the Commutation was located south of the William Sumner Grant and in the C.R. Nesbitt Grant.

[36] In response, Mr. Eneas urged the Court to consider the Chee-A-Tow Report as a whole, contending that the isolated quote that Signal Point fell outside the William Sumner tract was misleading without context. He argued that, having regard to the beginning of the report, it is likely that Mr. Chee-A-Tow regarded Signal or Sumner Point to be a specific landmark. He submitted that Signal or Sumner Point was a specific landmark on the southwestern tip of the bluff. Mr. Eneas' contention was that by 1954, the area around the 80 acre William Sumner Grant including Parcel B became known as Sumner Point. In support, he relied on the Affidavits of Mena Letitia Sumner, Susan Ellen Bain, Joseph Gardiner, Cleveland Maycock and Robert Nathaniel Bain and the Conveyances of Mena Letitia Sumner to Carl John Heyser Jr. and Evelyn Remilda Kelly and Castella Rachel Kelly to Carl John Heyser Jr., which referred to Sumner Point.

[37] Ms. Smith submitted that the Conveyances failed to convey the William Sumner land because the reference to Signal Point in the description is based on Mr. Chee-A-Tow's statement that Signal Point fell outside the William Sumner Grant and within the C. R. Nesbitt Grant and the 1954 and 1968 Conveyances' description having referred to Signal Point.

[38] For my part, the submission advanced by Ms. Smith is untenable. I agree with Mr. Eneas that the reference to Signal Point in the description of the property did not mean that the property comprising the conveyances was on the C.R. Nesbitt land instead of the William Sumner land. I accept that Signal Point was a very particular point and that the property became known as Signal/Sumner Point by that time.

[39] Mr. Eneas further submitted that Mr. Chee-A-Tow's Report confirmed that the location of the 80 acres described in the Crown Grant and the land described in the Commutation are one in the same. He emphasised that Mr. Chee-A-Tow's survey calculated the total acreage of the Commuted Land to be 95.809 of which 80.666 is Parcel A and 15.143 is Parcel B.

[40] Further, Mr. Williams stated that Parcel B is in Signal Point but is not the whole of Signal Point. Under cross-examination by Ms. Pyfrom who appeared for Wahoo Foundation (no longer a party in these proceedings), Mr. Williams stated that he understood the Chee-A-Tow's Report to mean that Signal Point was part of the C.R. Nesbitt Grant. He agreed that the Chee-A-Tow Report stated that Signal Point fell outside the William Sumner Grant and that it fell within the C.R. Nesbitt tract. He maintained that the William Sumner tract and Signal Point is outside that.

[41] Mr. Williams admitted that the description in the 1968 Conveyance and the plan prepared by Mr. Chee-A-Tow depicting the William Sumner tract conflict on all sides. He said that they may not be different tracts of land but they are described differently. Mr. Williams also explained that the description used in the 1954 and 1968 Conveyances does, contrary to the Crown's contention, encompass the 80 acre tract granted to William Sumner. Mr. Williams sought to reconcile the differences by stating that from the description in the 1954 and 1968 Conveyances, it appears that the orientation of the northern boundary is the salt pond which boundary is actually the eastern or north-eastern boundary in the Commutation. Using the orientation in the conveyances which places the salt pond in the north (as opposed to the east or northeast), the 15.43 acre tract would be situated south of the salt pond. I found Mr. Williams to be a convincing witness and I accept his opinions.

[42] The Petitioners also relied on a Minute Paper from Mr. Roscoe Turnquest to the Acting Surveyor General, Mr. Harold Hing-Cheong ("Mr. Hing-Cheong") dated 25 July 2008, where he concluded:

> **"Investigations into the survey plan of Rum Cay reveal that Crown Grant Commutation A³ -266 for William Sumner is in the correct position and all the distance and angles showing on the plan 11 of Rum Cay are correct. I seek the assistance of Mr. Daniel Wilkinson Senior Surveyor, and after his review of the plan he confirms my finding."**

[43] These findings were later communicated to Ms. Michelle Wells by the Surveyor General in a letter dated 30 July 2008 wherein he stated:

> **"Thank you for your letter of 21 July, 2008 in connection with survey plan number 11 of Rum Cay, which is on record in the Department. I am to confirm that 80 acre parcel originally granted to William Sumner resurveyed by Chee-A-Tow and Company Ltd. appears to be the same area laid out as shown on the Crown Grant diagram in A.D. 1847."** [the Commutation]

[44] According to the Petitioners, the Crown now disputes the diagrams and the description contained in the Commutation and contends that the placement of the coastline on the southwestern boundary of the 80 acres was a drafting mistake notwithstanding their previous findings that Parcel B was formed by accretion and its representations, through the Department of Lands and Surveys, up to 2010 that Parcel B was accreted land comprising a part of the land granted to William Sumner and not Crown property.

[45] As Mr. Eneas correctly contended and from the documents presented, the Crown has conducted extensive investigations into the characteristics and ownership of Parcel B and has consistently concluded that Parcel B is not Crown land.

Good root of title/commutation

[46] The Crown also objected to the Petitioners' documentary title on the ground that it does not commence with a good root of title. Ms. Smith argued that a good root of

title begins with a Crown Grant, lease from the Crown or Certificate of Title. She further argued that the QTA does not investigate a Commutation as a root of title.

[47] A good starting point in this discussion is to repeat the judicious words of Lord Walker in **Anthony Armbrister** [supra] at para. 7 of the Judgment. Lord Walker opined that the purpose of the QTA is to provide a judicial process for the determination of disputes as to title to land in the Bahamas. The procedure is in the nature of a judicial inquiry and it ends in a judgment *in rem* which, subject to appeal, finally settles entitlement to the land, not merely as between the parties, but for all purposes.

[48] As I understand it, in a quieting matter, a petitioner asserting documentary title is not required to show a good root of title, as the purpose of quieting is to validate defective titles. A good root of title and a chain of title for at least 30 years is *required* by the Conveyancing and Law of Property Act ("the CLPA").

[49] As Mr. Eneas correctly submitted, the only relevance of a "*good root of title"* in quieting matters stems from the operation of section 8(2) of the QTA which, when read conjunctively with section 3(4) of the CLPA, precludes a Court from requiring a title to be deduced further back than what is required to be proved under an ordinary vendor/purchaser sale. Put differently, the establishment by a petitioner of a "good root of title" may have the effect of providing the Court with a starting date for the commencement of the investigation which date the Court may decide not to investigate (although the Court is free to direct title to be deduced further back than the date of the good root of title should it direct).

[50] The Court of Appeal in **Bannerman Town** explained the relevance of deducing title in quieting proceedings at para 63 of its Judgment where Allen P stated:

> **"Considering the above authorities, a party to a quieting title action seeking to assert documentary title to land, is not prima facie required to rely on or deduce title to the land exceeding 30 years unless, in the words of section 8(2) of the Quieting Titles Act, the court so directs. Neither is an investigating judge prima facie required to have any party seeking to rely on documentary title, deduce documentary title**

> **<u>beyond 30 years</u>. However, if during the course of the investigation questions as to the validity of the documentary title arise, regardless of the age of the title in question, the learned trial judge is required by the Quieting Titles Act and the Conveyancing and Law of Property Act to direct that further evidence be provided. To hold any other way opens the door for the Quieting Title Act and the Conveyancing Law of Property Act to be used as instruments of fraud**."

[51] Mr. Eneas submitted that the above submissions and authorities clearly validate that it is unnecessary for a party to a quieting matter to demonstrate a "good root of title" to the property the subject matter of the proceedings.

[52] It is not clear that a commutation is not a good root of title. In **Evans v Carey** [1977-78] 1 LRB, the Bahamian Court of Appeal expounded that commutation was evidence of ownership. At page 185, Duffus JA said:

> **"…the proof of the payment of the quit rents by William Carey, and the, production of exhibit AC 2, recorded in the Commutation Book as B2-25 would be sufficient proof in accordance with section 9 that William Carey had acquired the ownership of the land granted to Charles Culmer."**

[53] However, the Court of Appeal omitted to definitively determine whether a commutation is regarded as a good root of title.

[54] In my opinion, I do not believe it is mandatory in quieting proceedings to show a good root for a documentary claim. As stated above, the role of the Court in quieting proceedings is to investigate and discover who has the better or superior title; not who has good title. The Court's primary concern is the relative strengths of the titles proved by the rival claimants. Therefore, the Crown's contentions that "*the Petitioners in earnest begins their root of title with the Commutation, the Petitioners have failed to prove a good root of title, and their Petition must fail"* seems wrong and is not supported by judicial authority.

[55] The Crown submitted that the Lots were not owned by Sumner Point Properties Limited ("SPPL") at the time they sold to Stephen Orlando, as the Conveyances of 1954 and then 1968 to its predecessors, did not have the effect of conveying the

Commuted Land. In response, Mr. Eneas said it is clear that each of the Lots is situate on the 20 acre parcel purchased by Rachel Sumner or on Parcel B or on both. He said that the 20 acres which Rachel Sumner acquired by the Provost Marshal sale in 1860 is most important because it is the portion of the property immediately adjoining Parcel B, which the Petitioners contend their predecessors obtained by accretion. According to Mr. Eneas, the Southwestern boundary of the coastal 20 acre parcel is described as being "the sea". As such, any enlargement to the Southwestern boundary as a result of accretion is owned by the owner of the 20 acre coastal parcel.

[56] I am satisfied that the 20 coastal acres immediately adjoining Parcel B was sold to SPPL and the relevant portions of the Lots subsequently sold to Stephen Orlando. It is true that, by the sale by the Provost Marshal in 1860, Rachel Sumner acquired 20 coastal acres of the 80 acres parcel of the William Sumner Grant (Commuted Land). Based upon the description in the Indenture of Conveyance dated 11 July 1860, the remaining 60 acres in the 80 acres Commuted Land became vested in Rachel Sumner upon her husband's death. Effectively, by 11 July 1860, Rachel Sumner had unified the title of the 80 acres tract. Of that, 80 acres, Rachel Sumner sold 5 acres which comprised the Southernmost tip or part of the 20 acres parcel to Eliza Taylor. On her death in 1905, the remaining 75 acres devolved on her eldest living son and heir-at-law, Peter James Sumner, who married Mena Letitia Sumner, who then conveyed her interest to Carl John Heyser Jr. Carl John Heyser Jr. obtained the remaining 5 acres from Evelyn Remilda Kelly and Castella Rachel Kelly. The remaining 60 acres was vested in Rachel Sumner upon her husband's death. However, the relevance of the 20 acre coastal parcel is the premise of the Petitioner's assertion as their predecessors' ownership of the accreted land.

Analysis on documentary evidence

[57] The Crown initially objected to the Petitioners' ownership of the 80 acres tract. At trial, however, the Crown changed its position, disputing only the Petitioners' assertion of ownership with respect to the 15.143 acres tract adjacent to the 80 acres tract, also known as Parcel B. Then, in submissions, the Crown did a

complete *volte* face by also objecting to the Petitioner's ownership of the 80 acres tract (Parcel A). The ambivalent nature of the Crown's submissions requires that I deal with both parcels in their entirety.

[58] It is irrefutable that the description between the William Sumner Grant and the Commutation is different. The question is what is the effect of that difference? Mr. Williams was unable to prove that the difference in the way in which the properties were described did not connote different boundaries altogether. As such, it is likely from that difference in description that the property conveyed to William Sumner by the Commutation was slightly different, at least with respect to the Southwestern boundary.

[59] However, the effect of a commutation is to certify the ownership of the land. Therefore, I see no reason why a claim to documentary title (especially in quieting proceedings, the purpose of which is to validate a defective claim) cannot be based on a commutation. While the property commuted to William Sumner may not have been the exact boundaries conveyed to him by the Crown Grant, (especially having regard to the fact that commutation is based on occupation) the Commutation is derived from the Crown Grant. As stated above, the very nature of Commutation was to facilitate the evolution from leasehold to freehold. The Commutation of the land is inextricably linked to the Crown Grant despite different boundaries and is prima facie evidence of the possession of the land commuted.

[60] In addition to the Commutation being premised on the William Sumner Grant, the intention that the Commutation and the documents that followed were based on the William Sumner Grant is relevant. All of the correspondence relied upon by Mr. Eneas identified the 80 acre tract (and the 15 acre tract) as being the land from the William Sumner Crown Grant. Therefore, in my judgment, the fact that the boundaries of the Commuted Land were different from that of the Crown Grant is of very limited consequence and it certainly does not defeat the documentary claim of the Petitioners.

[61] Ms. Smith submitted that the Petitioners are estopped from denying the terms of the William Sumner Grant since they are privy to its terms and agreed to admit it as true. She relied on **Bannerman Town** where the Court of Appeal applied the principle that by being a party to a deed which contains a recital, all the parties agree that the contents therein are true and that this estops any party from denying the truth. Ms. Smith seems to be suggesting that by relying heavily on the Commutation for their documentary claim and having regard to the difference in the southwestern boundary in the descriptions, the Petitioners have denied the William Sumner Grant. However, the Petitioners have not sought to *deny* the terms of the William Sumner Grant by their reliance on the Commutation. In fact, the William Sumner Grant has been the very underpinning of the Petitioners' case; namely that Parcel A is the very same property that was granted to William Sumner and that Parcel B naturally formed over time. Accepting a variance of the descriptions between the documents and asking the Court to prioritise the extrinsic evidence confirming that the properties are the same notwithstanding that irreconcilable difference is not, in my judgment, disregarding it. The point is that the Commutation was based on the Crown Grant notwithstanding that the descriptions may have been imperfect. The intention that it was the same property is overwhelmingly unequivocal. It was in the same position. This was even agreed by Mr. Ferguson, the Crown's expert. So, even with a different description, the Petitioners are not seeking to disregard the Crown Grant.

[62] The Crown objected to SPPL being the owner at the time they sold to Stephen Orlando. Specifically, they object to the descriptions used in the Provost Marshal Conveyance and the 1954 and 1968 Conveyances. However, I agree with Mr. Eneas that the documents reveal that SPPL owned the property at the time they sold to the Petitioners for valuable consideration. The Commutation description describes the property as being bounded by the sea on the southwest. Twenty acres of the coastal boundary of the 80 Commuted Land were sold to Rachel Sumner by Indenture of Conveyance dated 19 June 1860, as the description in that Conveyance reflects. Further, in support, I accept the evidence of Mr.

Williams, confirming that the Provost Marshal Conveyance conveyed 20 acres to Rachel Sumner along the coast.

[63] In addition, the Commutation plan, prepared by J.J. Burnside, the Surveyor General for the Colony, in 1847, clearly describes the property commuted to William Sumner in 1847 as being bounded by the sea on the Southwest.

[64] With respect to the difference in description between the Crown Grant and the Commutation, the parties agree that there is a difference with respect to the southwestern boundary. However, there is overwhelming evidence which establishes that the property commuted to William Sumner was first granted to him by Crown Grant. The intention for the property to be the same is clear.

[65] With respect to the different description used in the 1954 and 1968 Conveyances, the statement in the Chee-A-Tow report that Signal Point fell outside the William Sumner Grant and in the C.R. Nesbitt Grant does not, in my judgment, mean that the Commuted Land was not the William Sumner property. As stated, the reference to Signal Point did not have the effect suggested by Ms. Smith because it was a specific point.

[66] I agree with Mr. Eneas that the fact that the property described in the Conveyances is larger than 80 acres or purports to transfer more property than 80 acres does not invalidate the Conveyances. Mr. Chee-A-Tow measured the property as more than 80 acres, yet the property was still referred to as an 80 acre tract. In any event, it is likely that the difference in measurement was the result of (i) margin of error in surveying, as the initial survey would have been conducted many years ago with different methods and (ii) accretion, as alleged by the Petitioners.

[67] Further, and in any event, having regard to the overwhelming extrinsic evidence (in particular the correspondence within the Department of Land and Survey and from the Department to the Ministry of Legal Affairs to the effect that the Commuted Land was the land from the William Sumner Crown Grant), I am satisfied that the

land referred to in the 1954 and 1968 Conveyances was the very land in the William Sumner Grant.

[68] While the documentary title relied upon by the Petitioners may not be perfect, it does, however, reflect a clear unbroken chain of conveyances extending over a period in excess of 160 years originating from the William Sumner Crown Grant of 80 acres and ultimately the conveyances of the subject lots to the Petitioners. On a balance of probabilities, the Petitioners have established that they are the owners of the lands comprising a portion of Parcel A.

The law
Adverse possession

[69] The time period required for proving adverse possession is prescribed in section 16(3) of the Limitation Act, 1995, Chapter 83. Section 16 provides:

> **"16. (1) Subject to subsection (2), no action shall be brought by the Crown to recover any land after the expiry of thirty years from the date on which the right of action accrued to the Crown or, if it first accrued to some person through whom the Crown claims, to that person:**
>
> **Provided that the time for bringing an action to which the provisions of this section apply in respect of a cause of action which has accrued before the commencement of this Act, shall, if it has not then already expired, expire at the time when it would have expired apart from those provisions:**
>
> **Provided further that the time when the cause of action would have expired as aforesaid shall not exceed thirty years from the date of commencement of this Act.**
>
> **(2) An action to recover foreshore may be brought by the Crown at any time before the expiry of sixty years from the date of the accrual of the right of action, or of thirty years from the date when the land ceased to be foreshore, whichever period first expires…."**

The law of possession

[70] It is common ground that in order to sustain a claim of adverse possession, the claimant must establish both (i) factual possession and (b) the requisite intention to possess.

[71] This basic proposition was re-stated by Lord Browne-Wilkinson in **J A Pye (Oxford) Ltd and another v Graham and another** [2002] UKHL 30 quoting Slade J. in **Powell v McFarlane** (1977) 38 P & CR 452, 470 stated at paragraph 40:

> **"(1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner.**
>
> **(2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ("animus possidendi").**"

[72] Later on, in the same paragraph, Lord Browne-Wilkinson simplified the two elements necessary for legal possession in this manner:

> **"1. a sufficient degree of physical custody and control ("factual possession");**
>
> **2. An intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess").**"

Factual possession

[73] In **Pye**, Lord Browne-Wilkinson, in adopting the definition of factual possession by Slade J in **Powell**, said at para. 41:

> **"(3) Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed….Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so."**

Intention to possess

[74] **Slade J.** in **Powell** defines the "*animus possidendi*" in this way:

> (1) **The *animus possidendi,* which is also necessary to constitute possession, was defined by Lindley M.R., in Littledale v. Liverpool College (a case involving an alleged adverse possession) as "the intention of excluding the owner as well as other people." This concept is to some extent an artificial one, because in the ordinary case, the squatter on property such as agricultural land will realise that, at least until he acquires a statutory title by long possession and thus can invoke the processes of the law to exclude the owner with the paper title, he will not for practical purposes be in a position to exclude him. What is really meant, in my judgment, is that, the *animus possidendi* involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow."** [Emphasis added]

[75] With respect to the burden of proof, **In the Matter of ALL THAT piece parcel or lot of land situate in the Settlement of Hunters on the Island of Grand Bahama** [2013] 1 BHS J. No. 6, Sir Michael Barnett CJ stated at paras [85] – [87]:

> **"85 As opined by Adams, J. in the case of Re Roman Catholic Apostolic of the Bahamas [1984] BHS J. No. 34 at paragraph 52:**
>
> > **"As regards the burden and nature of proof and the desired quality of possession, the adverse claimant by himself and his predecessors had to meet the criteria indicated in Sherren v. Pearson 14 Can S.C.R. 581 where Ritchie C.J. said at p. 585:**
> >
> > > **'To enable the trespasser to recover he must show an actual possession, an occupation exclusive, continuous, open or visible, and notorious for the twenty years. It must not be equivocal, occasional or for a temporary or special purpose.'"**
>
> **86 It used to be that in order for a trespasser to establish a squatter's title he had to prove that he or his predecessors took active control over every portion of the land he was claiming (see Scarr J in The Grand Bahama Port Authority Limited v Smith, No. 170 of 1961).**
>
> **87 However, in Higgs v Nassauvian Ltd [1975] A.C. 464, the Privy Council held that "there was no general principle that to establish possession of an area of land a claimant had to show that he had made physical use of the whole of it and that acts done on part of the land could establish possession of the whole land". The court decided that whether those acts did establish possession was a**

> **question of fact and degree and depended on a consideration of all the circumstances."**[Emphasis added]

[76] Further, in order to succeed in a claim for adverse possession, the [adverse] claimant must show positively that the true owner has gone out of possession of the land, that he has left it vacant with the intention of abandoning it. The mere fact that the title owner is shown to have made no use of the land during the period does not necessarily amount to discontinuance of possession. The learned author, Samson Owusu in the treatise "**Commonwealth Caribbean Land Law**, p. 280, in discussing adverse possession, in stating:

> **"These should be acts, which are inconsistent with the enjoyment of the soil by the person entitled to the land. The land should have been used in a way, which altered or interfered in a permanent or semi permanent way with the land. A classic case is where the disputed land is fenced and substantial structures are constructed on it by the squatter, leaving in its trail substantial traces of use."**

[77] In addition, the quality of the possession by an adverse claimant must be considered.

Possessory title by the Petitioners

[78] The Petitioners ground their possessory claim on the possession of their predecessors in title commencing with the possession of the Commuted Land in 1847, when the land was commuted to William Sumner.

[79] Mr. Eneas submitted that the possession of Rachel Sumner is clear by virtue of her acquisition of 75 of the 80 acres, evidenced by the Conveyance along with affidavits, which he argued, establishes that she entered into possession in or about 1936 and remained in exclusive possession until her swearing of the affidavit in 1954. He also relied on the affidavit of Susan Ellen Bain, wherein she deposed to Mena Letitia Sumner entering into possession of the 75 acres after the death of her husband, Peter James Sumner, the son of Rachel Sumner.

[80] With respect to the other 5 acres which had been severed by Rachel Sumner on 11 July 1860 when she disposed of it (and is therefore connected to the other 75

acres), Mr. Eneas submitted that it had been in the possession of Evelyn Remilda Kelly and Castella Rachel Kelly for approximately 30 years prior to 1954. He relied on the affidavits of Joseph Gardiner sworn on 11 February 1954, the affidavit of Cleveland Maycock and the affidavit of Robert Nathaniel Bain, both sworn on 11 February 1954.

[81] Mr. Eneas urged the Court to accept the foregoing as facts. He cited the Bahamian Privy Council case of **Armbrister** where the Board applied section 3(3) of the CLPA in quieting proceedings on the presumption of accuracy of documents more than 20 years to quieting proceedings. Section 3(3) provides:

> "**(3) Recitals, statements and descriptions of facts, matters and parties contained in deeds, instruments, Acts or declarations, twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of truth of such facts, matters and descriptions.**"

[82] Additionally, Mr. Eneas submitted that it has long been established that "…*in the absence of evidence to the contrary, the owner of land with paper title was deemed to be in possession, and the law would thus, without reluctance, ascribe possession either to him or to persons who could establish a title through him":* **Powell v McFarlane** [supra] at page 13 of the Report.

[83] Mr. Eneas also relied on the Bahamian Privy Council case of **Ocean Estates v Pinder** [1962] 2 AC 19, where the Board set out a presumption of entitlement in favour of persons who have dealt with land by conveying interest. Lord Diplock held at page 25 as follows:

> "**In the present case, where the defendant made no attempt to prove any documentary title in himself or in any third party by whose authority he was in occupation of the land it would have been sufficient for the plaintiffs to rely upon the conveyance of the land to themselves of March 30, 1950; <u>for where a person has dealt in land by conveying an interest in it to another person there is a presumption, until the contrary is proved, that he was entitled to the estate in the land which he purported to convey</u>.**" [Emphasis added]

[84] Accordingly, says Mr. Eneas, the Petitioners relied upon the relevant legal presumptions and the recitals and statements in the historic documents of title together with the affidavit evidence recorded in 1954 in support of their claim that their predecessors in title acquired title to Parcel B by adverse possession. The Petitioners argued that this evidence has not been affected by any contemporaneous claims and where inconsistencies exist between the evidence of the Petitioners and the Crown, the evidence adduced by the Petitioners ought to be preferred.

[85] Learned Counsel Ms. Smith first submitted that since the Petitioners allege that the William Sumner Grant was along the western coastline and the 15 acres tract is along the Southwest coastline, they must prove that they or their predecessors were in possession of the said lands for a period of 60 years or more to oust the Crown. According to her, there is no evidence that the Petitioners or the persons through whom they claim possession, had been in possession of Parcel A and/or Parcel B, for a period of 60 years or more.

[86] She asserted that, at the time of the Commutation, the descendants of William Sumner occupied the land that was actually the C.R. Nesbitt Grant and not the William Sumner Grant. I have already rejected that interpretation put forward by the Crown, finding that the reference to Signal Point in the description of the property did not mean that the property was not on the C.R. Nesbitt land instead of the William Sumner land and finding that Signal Point was a very particular point and that the property had merely become known by Signal/Sumner point by that time.

[87] Ms. Smith pointed out that the Petitioners failed to adduce evidence as to possession of the land by Sumner Point Properties. The evidence as to possession was, at its most recent, as long ago as 1954. No possessory evidence was adduced with respect to Carl John Heyser Jr. and SPPL, who owned the property before Stephen Orlando.

[88] Ms. Smith also objected to the Petitioners' possessory claim on the basis that they are non-nationals. She submitted that SPPL (its President and Director being a non-national) failed to obtain a permit for landholding, which SPPL was required to do pursuant to the International Persons Landholding Act, Ch 140 which provides that non-Bahamians and companies under the control of non-Bahamians are required to obtain a permit in order to hold land in The Bahamas.

[89] Ms. Smith made reference to the oral testimony of David Cummings ("Mr. Cummings") for the Wahoo Foundation who described Mr. and Mrs. Little and their son, Bobby Little, as foreigners from Florida who occupied and lived in a home on the William Sumner tract.

[90] Ms. Smith insisted that there is no evidence to demonstrate that the descendants of William Sumner and/or the predecessors of the Petitioners were in actual possession of the land the subject of the William Sumner Grant. She reiterated that, in the case of the crown land, a claimant must show that he was in possession for 60 years where the subject land is on the seaside/foreshore and where the land is located elsewhere, a claimant must show that he has been in possession for 40 years.

[91] She submitted that the Petitioners have not proven that their predecessors in title were in possession of the William Sumner tract for 40 years prior to 1994 (when they sold portions of the land to the Petitioners). In that regard, she relied on the evidence of James Engelder. Mr. Engelder stated that, in or about 1994, he was hired by the late Stephen Orlando to effect certain repairs on his yacht. He said that the repair was completed in that year and immediately thereafter, he accompanied Mr. Orlando to Rum Cay. In 1995 or 1996, Mr. Engelder said that Mr. Orlando hired him as a boat captain. He made numerous trips to Rum Cay with Mr. Orlando between 1996 and 2000. The trips would range from 1 week to several months, the longest being 11 months.

[92] Mr. Engelder said that while in Rum Cay, Mr. Orlando engaged local workers to clear brush and debris from lot 2 and to maintain the lot. Mr. Orlando enjoyed

gardening and maintained a garden on lot 2. He also observed decorative landscape walls and paths constructed by Mr. Orlando and that he purchased decorative trees from local residents and planted them on lots 2 and 3.

[93] Mr. Engelder stated that because Mr. Orlando enjoyed Rum cay, in addition to lot 2, he purchased 3 additional lots from SPPL – lots 3, 9 and 10. He later acquired lot 5 from Paul Breton by conveyance in 2000.

[94] Before he fell ill, Mr. Orlando frequently spoke about constructing a vacation home on lot 5. He said he remembers seeing architectural plans for a home Mr. Orlando planned to construct thereon. According to Mr. Engelder, Mr. Orlando spoke of constructing a boutique hotel on lots 9 and 10, which adjoined the eastern side of the inner harbor and the marina. He said he recalls Mr. Orlando having commissioned an architect to draw plans for the hotel and a landscape architect to prepare landscape plans for an elaborate design.

[95] Because the inner harbour of the marina could not accommodate the draft of Mr. Orlando's yacht, he arranged with Mr. Little that until such time as the inner harbor had been dredged, Mr. Orlando was entitled to moor his yacht in one of the marina slips free of charge. In preparation for the development of the boutique hotel on lots 9 and 10, Mr. Engelder said that he was asked by Mr. Orlando to inquire with various construction companies about the proposed construction of a dock slip in the inner harbor.

[96] From 1994 to 2000, Mr. Orlando, by his frequent visits to Rum Cay occupied the lots either by his own physical possession or by his agents on his behalf who assisted him in clearing and maintaining the land.

[97] Mr. Engelder said he was present in 2001 or 2002 when Mr. Orlando bought another yacht. He said Mr. Orlando's trips to Rum Cay ceased in 2003 or 2004 when his health declined, but he (Mr. Engelder) returned to Rum Cay in or about mid-2006, when he was hired to manage the marina, which he did for approximately 6 months before returning to the United States.

[98] He said he never heard Mr. Orlando speak about anyone challenging his ownership of the lots.

[99] Under cross-examination by Ms. Pyfrom, who appeared for Wahoo Foundation, Mr. Engelder asserted that, in addition to planting coconut trees, Mr. Orlando put a building on lot 2 “in ‘95/96 maybe”, which held his “Kawasaki and some garden tools. He was unsure of the size of the building. When asked whether Mr. Orlando hired someone to maintain the lot, Mr. Engelder said that he was there working on it himself, as there were not yet any locals there to work on it. He said after Mr. Orlando died in 2005, there was some ongoing care although he was unsure of how much.

[100] Under cross-examination by Ms. Smith, Mr. Engelder stated that the building was a little bigger than a tool shed and was not lived in. He said when he returned to Rum Cay in 2006 for his 6 month engagement, the building was still there. The coconut trees that Mr. Orlando planted were still there.

[101] Scott Findeisen, one of the trustees of the Stephen A. Orlando Revocable Trust, also testified, on behalf of the Petitioners. As at the date of his oral testimony, he had not visited Rum Cay. He became a co-trustee on 23 October 1999. He attested to the payment of all real property taxes relative to the Lots up until the year 2012. He also stated that he became aware of certain acts of trespass on the lots by the Wahoo Foundation and Mr. Cummings which commenced in or about October 2012.

[102] Ms. Smith submitted that based on the evidence adduced the Petitioners nor their predecessors in title could not establish possession sufficient to oust the Crown of its title of the Lots.

[103] Ms. Smith further submitted that the Petitioners, in their Re-Amended Abstract of Title, at page 10, stated that in 1905 (the date of the death of his mother Rachel Sumner), Peter James Sumner took possession of the property namely “[A]*ll that*

piece parcel or tract of land known as "Sumner Point" situate to the East of Port Nelson in the said Island of rum Cay containing about seventy-five (75) acres and bounded as follows Northerly by a salt pond Easterly by vacant land Southerly by land of William F. Dorsett and Westerly by vacant land" and occupied the same exclusively until his death in 1936. According to Ms. Smith, this property does not describe the William Sumner tract.

[104] Accordingly, says Ms. Smith, the Petitioners have failed to prove possessory title of (i) 30 years to the lots in Parcel A (80 acres) and (ii) 60 years to the lots in Parcel B (15 acres) and, in either case, the Crown's title has not been extinguished.

Analysis on possessory title

[105] The Privy Council in **Bannerman Town**, at para 50, stated that in order for there to be possession sufficient enough to demonstrate ownership of the subject land (whether documentary or possessory), the possession must be proved for the whole of the time prescribed by the Limitation Act.

[106] As evidence of their possession, the Petitioners, in the first instance, rely upon the possession of their predecessors in title (i.e. William Sumner, Rachel Sumner, Peter James Sumner, Mena Letitia Sumner, Evelyn Remilda Kelly and Castella Rachel Kelly and their successors in title). The possessory title of their predecessors was conveyed to SPPL and thereafter to the Petitioners through the chain conveyances set out in the Petitioner's Re-amended Abstract of Title filed on 11 March 2020. As noted by the Privy Council in the Bannerman Town Case the possession of a claimant may be the possessory title "*…derived from an original possession of the Property by themselves or their predecessors as trespassers."*

[107] The devolution of title of the subject property is set out in the Petitioners' Re-Amended Abstract of Title. The Petitioners' claim for possession originated with the possession of William Sumner as evidenced by the Commutation in 1847. It is accepted by both parties that the Commutation is evidence of the property actually

occupied by the Commutatee. The Court has already found that the physical location of the 80 acres described in the William Sumner Grant and the land described in the Commutation are in the same location and occupy the same space.

[108] The possession of William Sumner relative to the coastal 20 acres was conveyed to Rachel Sumner under the Provost Marshal conveyance in 1860. There is also evidence of Rachel Sumner acquiring the remainder of the 80 Acres William Sumner Grant. Following her death on 31 March 1905, Peter James Sumner inherited her property which was ultimately vested in Mena Letitia Sumner following the death of her husband, Peter James Sumner.

[109] The property inherited by Mena Sumner was conveyed to Carl John Heyser, Jr. in 1954 together with a five (5) acre parcel of land in the possession of Evelyn Remilda Kelly and Castella Rachel Kelly.

[110] As Mr. Eneas correctly suggested, the above matters clearly ascertain that as of the date of the Commutation to William Sumner in 1847, he was in actual occupation of the property the subject matter of the Commutation. Rachel Sumner acquired the coastal 20 acres in 1860. The evidence of Mena Letitia Sumner confirms that following the death of Rachel Sumner, they occupied the property up until the sale of the same in 1954 to Carl John Heyser, Jr. In addition, the 5 acre parcel on the point was in the exclusive possession of Evelyn Remilda Kelly and Castella Rachel Kelly and they were cultivating it. They also sold their 5 acre parcel to Carl John Heyser, Jr. in 1954. The property acquired by Carl John Heyser, Jr. was ultimately conveyed to SPPL in 1968. SSPL surveyed the property (including Parcel B) in November 1977 and undertook a development project for the property which included the subdivision of the same into lots for sale.

[111] Mr. Stephen Orlando purchased the Lots at different times commencing in 1994 (Lot 2), 1998 (Lot 3, 9 and 10) and 2000 (Lot 5). His possession of the Lots is set out in the Affidavit of James Engelder which stood as evidence in chief in this

Court. Mr. Engelder confirmed Mr. Orlando's exclusive and continuous possession of the property comprising the Lots including the following acts of user:

1. The construction of the shed on Lot 2 in or about the year 1994;
2. The construction of decorative landscaping walls and paths on Lot 2;
3. The planting of decorative trees on Lots 2 and 3 and;
4. Maintaining and manicuring of each of the Lots comprising Lots 2, 3, 5, 9 and 10.

[112] Mr. Engelder testified that, Mr. Orlando, and upon his death, his Trustees, occupied the Lots free from any interference up until the year 2013 when the trustee became aware of certain isolated acts of trespass by The Wahoo Foundation and Mr. Cummings. Mr. Scott Fendeisen also confirmed the afore-mentioned certain isolated acts of trespass in 2013.

[113] In my judgment, the afore-mentioned matters clearly establish that between 1847 and 2013, the Petitioners and their predecessors were in exclusive possession of the Lots.

[114] With respect to the *animus possidendi (*intention to possess), the Crown contends that the Petitioners have failed to demonstrate the necessary *animus possidendi* to acquire title to the Lots by adverse possession. In this regard, the Petitioners rely on the evidence of Scott Findeisen in which he deposed to the payment of all real property taxes relative to the Lots up until the year 2012.

[115] Mr. Eneas relied on the treatise, **Adverse possession, 2nd ed. 2011** in which the learned authors, state at para13-82 that the payment of rates or other taxes could not constitute the factual element of possession. However, the payment of taxes levied on the person in possession is evidence of the *animus possidendi.*

[116] The learned authors went on to state, at para 13-84 that:

> **"In Australia, the payment of rates by a squatter has been held to be significant, especially if acquiesced in by the owner, while the**

> **payment of rates by a true owner out of occupation has been said to be only very slight evidence that the squatter is not in possession. In England and Wales domestic rates were abolished in 1990. However, with commercial property, the payment of rates by a squatter would be evidence of the animus possidendi as rateable occupation has been equated with actual possession. In the case of residential premises, payment of council tax by a squatter would be strong evidence that he was resident, but not necessarily that he was in possession.**"

[117] Further, the Petitioners relied upon the evidence of Mr. Engelder. He testified that Stephen Orlando had the intention to construct a vacation home on Lot 5 and a boutique hotel on Lots 9 and 10 and refers to the architectural/landscape plans procured and associated therewith. To my mind, this is clear evidence of *animus possidendi* and is demonstrative of Stephen Orlando's intention to possess the property and to treat it as his own to the exclusion of the world at large.

[118] The Petitioners also relied upon the principle that evidence of actual possession is sufficient to establish *animus possidendi* (i.e. established by the *prima facie* evidence of actual possession resulting from the execution of the Commutation). Where there is proof of factual possession the necessary animus will be inferred. This principle was explained by Lord Hutton in **JA Pye (Oxford) Ltd** [supra] stated at para 76:

> **"I consider that such use of land by a person who is occupying it will normally make it clear that he has the requisite intention to possess and that such conduct should be viewed by a court as establishing that intention, unless the claimant with the paper title can adduce other evidence which points to a contrary conclusion. Where the evidence establishes that the person claiming title under the Limitation Act 1980 has occupied the land and made full use of it in the way in which an owner would, I consider that in the normal case he will not have to adduce additional evidence to establish that he had the intention to possess. It is in cases where the acts in relation to the land of a person claiming title by adverse possession are equivocal and are open to more than one interpretation that those acts will be insufficient to establish the intention to possess. But it is different if the actions of the occupier make it clear that he is using the land in the way in which a full owner would and in such a way that the owner is excluded".**

[119] In my judgment, William Sumner and his successors in title have occupied the subject property, the subject of this Petition, since the Commutation in 1847. They had peaceful and uninterrupted possession of the property the subject of this petition for over 100 years. No one has objected or challenge their possession until shortly before the commencement of these proceedings. They have therefore established the requisite factual possession and *animus possidendi* for a possessory title.

Investment Board permissions

[120] The Crown alleged that SPPL required permission from the Investments Board to acquire/develop property in The Bahamas. The Petitioners dispute this allegation.

[121] The Crown contended that, according to the Immovable Property (Acquisition for Foreign Persons) Act, 1981, large tracts of land, islands and cays could not be sold to foreigners except where prior approval for land use and economic development have been obtained. According to the Crown, the Petitioners have failed to lead evidence to prove that the prior approval was given for land use and economic development before the purchase of 80 acres of land in the Bahamas in 1975 when the name of the Company was changed from H&M Corporation Limited to SPPL.

[122] The Immovable Property (Acquisition for Foreign Persons) Act, 1981 was repealed and replaced by the International Persons Landholding Act, 1993. The latter Act was passed to facilitate the holding of land by non-Bahamians and by companies under their control.

[123] As Mr. Eneas correctly alluded to, SPPL (formerly The H & M Corporation Limited) acquired the land comprising the 80 acre tract in 1968. At the time of the acquisition there were no restrictions, statutory or otherwise prohibiting or otherwise inhibiting the acquisition of real property by a foreign person.

[124] On 1 November 1983, the Immovable Property (Acquisition by Foreign Persons) Act, 1981 came into force. By section 17 of that Act all existing rights, privileges

and capacities acquired by foreign persons in immovable property prior to the enactment of the statute were saved.

[125] In **John Frank Dalton v. The Lyford Cay Company Limited** *No. 1177 of 1983* Adams, J. held that the effect of section 17 of the Act was to exempt the purchaser in that case from the requirement to obtain a permit in circumstances where the purchaser's contract for the acquisition of the property was made prior to the enactment of the statute. On page 5 of the Judgment, the judge said:

> "**As beneficial owner in equity the plaintiff has acquired a right in relation to the holding of immovable property. He has also acquired a capacity in relation to its possession or enjoyment. His existing rights at the time of the coming into force of the Act are preserved by section 17. He is exempt from the requirement of a permit from the Foreign Investment Board. His right is not merely to recover his deposit but obtain a conveyance.**"

[126] SPPL acquired the 80 acre tract in 1968 long before the enactment of the Immovable Property (Acquisition by Foreign Persons) Act, 1981. Mr. Eneas correctly submitted that, by a parity of reasoning, its rights and interest in the property (as in the Dalton Case above) were therefore preserved under section 17 of that statute. There is nothing in the International Persons Landholding Act, 1993 (which repealed the Immovable Property (Acquisition by Foreign Persons) Act, 1981) which required SPPL to obtain a permit to own or sell the land.

[127] It is also trite law that statutes do not have retrospective or retroactive effect unless there is express language in that statute to that effect. The International Persons Landholding Act, 1993 could not and did not affect the title to the 80 acre tract which was lawfully acquired and held by SPPL at the time that act came into force.

[128] The argument by the Crown that SPPL required the permission of the Investment Board is groundless.

Is Parcel B accreted land?

[129] The Petitioners contended that the land comprising Parcel B (15 acres) was created by accretion/alluvion. Consequently, SPPL, as the owner of Parcel A, was

entitled to Parcel B by the doctrine of accretion. Accordingly, SPPL was fully competent and entitled to convey its interest therein to Mr. Orlando.

[130] On the other hand, the Crown argued that the Petitioners have failed to establish, on a balance of probabilities, that Parcel B was formed by natural accretion. Instead, the Crown alleged that if there were accretion, it was man-made from the excavation of the pond.

[131] The doctrine of accretion is explained in Halsbury's Laws of England, 5th ed., Volume 100 at page 61 as:

> **"39. The doctrine which is conveniently called 'the doctrine of accretion' recognizes the fact that where land is bounded by water, the forces of nature are likely to cause changes in the boundary between the land and the water. 'Accretion' means the gradual and imperceptible receding of the sea or inland water, and 'alluvion' means the gradual and imperceptible deposit of matter on the foreshore. Both lead to an addition to the land or foreshore.**
>
> **Dereliction means the gradual and imperceptible encroachment of water onto land causing a reduction in the surface area of the foreshore.**
>
> **40. The presumption of law is that where land or foreshore is subject to accretion or alluvion and the added land is above high-water mark, the addition belongs to the owner of the dry land to which it is added, and if the added land is above the low-water it belongs to the owner of the foreshore. Evidence can be adduced to rebut this presumption, but that evidence must be strong.**"[Emphasis added]

[132] To determine this issue, the evidence of the expert witnesses is of paramount importance.

Expert witnesses
Mr. Hubert Williams

[133] Mr. Williams filed a Witness Statement on 22 February 2019 which stood as his evidence in chief at trial. He has been a licensed land surveyor from 1986 to the date of his sad demise during the Covid-19 pandemic. He was paid by the Petitioners to give his opinion on the location of the 80 acre tract, the 1977 Chee-A-Tow Survey Report and the accretion of the 80 acre tract.

[134] Mr. Williams received his training in photogrammetry at the International Technological Center in the Netherlands where he obtained a Diploma in photogrammetry. He also studied land surveying at North East London Polytechnic in London, England. He received a Diploma which covers land surveying, hydrographic surveying, engineering surveying, geodetic surveying, land law and land economy. He is a member of the Royal Institute of Chartered Surveyors. He has given expert testimony in the Supreme Court on numerous occasions. Because of his qualifications and experience, he was deemed an expert in land surveying and photogrammetry.

[135] With respect to the description in the William Sumner Grant, Mr. Williams stated that he routinely identified property by referring to descriptions in Crown Grants and plans thereto along with related commutations during his 27 years while employed at the Department of Lands & Survey. He said his experience has been that the descriptions and plans are important resources for determining the location. Although modern instrumentation sometimes demonstrated that there were errors in acreage or the dimensions, the descriptions and plans were generally accurate as to the location and placement.

[136] Mr. Williams asserted that the Commutation described the tract as being southwardly bounded by the sea. He noted that a small portion of the southwestern boundary is bounded by what appears to be a small protrusion or bluff, situate outside the tract. According to him, from the plan and the description, it is clear that at the time of the preparation of the Commutation in 1847, the 80 acre tract was bounded by the sea on the majority of the southwestern boundary.

[137] Mr. Williams further stated that the description and plan in the Commutation is inconsistent with the description in the Williams Sumner Crown Grant. He testified that he does not know the reason for the inconsistency but he observed that the Commutation was signed by the Surveyor General of the Colony at the time. He said that, in his experience, the description in the Commutation would be prepared

using field notes and that where land was being located based on a commuted Crown Grant, the plan and description in the Commutation would be used as the starting point in determining the location of the property in question.

[138] Under cross-examination by Ms. Smith, Mr. Williams said that Commutation shows what is on the ground because they had to survey before they commuted the land. He stated that, in addition, they would have surveyed before the crown grant but with commutation, because you were in occupation of the land, the commutation is done according to occupation.

[139] Mr. Williams opined that Mr. Chee-A-Tow was considered a well-respected senior surveyor in The Bahamas. He said that the Chee-A-Tow's 1977 Survey shows the 80 acre tract and the 15.43 acre tract adjoining the southwestern boundary. He referred to a letter by Mr. Chee-A-Tow to the then Deputy Director of the Department, stating that the plan and description of the Commutation formed the basis of the 1977 Survey and that the total acreage of the tract surveyed comprised 95.805 acres as a consequence of what was described as natural accretion in the area as a result of prevailing weather conditions over the years.

[140] Mr. Williams further opined that Mr. Chee-A-Tow's findings were correct. In his experience, if the contents of a survey was disputed by the officer in the Department responsible for recording same, the plan would not be recorded until either the issues were satisfactorily addressed by the surveyor or the officer was otherwise directed to record the plan pursuant to an order of the Court. He said the survey shows occupation on the 15 acres and 80 acres with the rock walls and buildings.

[141] He stated that the location of the 80 acre tract was the subject of considerable investigation by the Department of Lands & Survey between 1994 and 2008. He referred to correspondence between the Department of Land and the Office of the Attorney General to the effect that the 15.43 acre tract was accreted land that formed part of the William Sumner Grant. He also referred to letter dated 16 August

2010 by Audley Greaves of the Office of the Prime Minister that despite the determination of Acting Surveyor General, Mr. Hing-Cheong, the view of the Minister responsible for Lands and Surveys was that the accreted land was owned by the Crown and not by the owner of the adjoining property.

[142] Mr. Williams asserted that Mr. Chee-A-Tow, Mr. Wason and Mr. Hing-Cheong were all Guyanese who had considerable experience in the field of hydrography (the study of oceans, seas, coastal areas, lakes and rivers as well as the prediction of their change over time) because of their work in Guyana associated with the Demerara River projects and other tidal issues. He said that this qualified them to make determinations relating to physical features near the southern boundary of the 80 acre tract. Mr. Williams said they all opined that the Commuted Land was the land from the William Sumner Grant and that the land had enlarged naturally overtime.

[143] With respect to the accretion of the land, Mr. Williams attested that, on the basis of an aerial photograph of Rum Cay taken on 4 January 1970 and a topographical map of Rum Cay, the 15.4 acre tract is visible and the southwestern boundary in the photograph has changed from the Commutation Plan to include a salt pond and a large sand dune, situate above the high water mark. There is no visible evidence in the 1970 aerial photograph of development or artificial works to the pond, surrounding land or foreshore which would have created the pond or sand dune.

[144] He further opined that the extent of the obvious changes to the boundary could, in this region, only have reasonably been caused by the processes of alluvion or accretion, or a combination of both. He said alluvion is the gradual and imperceptible deposit or accumulation of matter on the foreshore and accretion is the gradual and imperceptible receding of the sea.

[145] According to him, in addition to accretion, there is evidence of alluvion around the bluff, which is the likely cause of the accumulation of the sand deposits forming the

large sand dune on which lots 2 and 3 are situate. It is likely that this was caused by the bluff or protrusion which is the southwest corner of the 80 acre tract and which operated like a groin to disturb the natural long shore drift resulting in the accumulation of sand in the cove like area over many years. Under cross-examination by Ms. Smith, Mr. Williams said that he did not do soil samples or title measurement to come to that conclusion.

[146] Mr. Williams opined that the description in the Affidavit of Cleveland Maycock as to the exclusive possession of Evelyn Remilda Kelly and Castella Rachel Kelly refers to the 15 acre land/Parcel B. He said Parcel B is in Signal Point but is not the whole of Signal Point.

[147] Under cross-examination by Ms. Pyfrom, Mr. Williams said that he understands Mr. Chee-A-Tow's survey report to mean that Signal Point was part of the C.R. Nesbitt Grant. He agreed that Mr. Chee-A-Tow said that Signal Point fell outside the William Sumner Grant and that it fell within the C. R. Nesbitt Grant. He maintained that the William Sumner tract and Signal Point is outside of that (C.R. Nesbitt Grant).

[148] Mr. Williams also admitted that the description in the 1968 Conveyance and the plan prepared by Mr. Chee-A-Tow depicting the William Sumner tract conflicts on all sides. He said they may not be different tracts of land but are described differently. He further stated that the description used in the 1954 and 1968 Conveyances does, contrary to the Crown's contention, encompass the 80 acre tract granted to William Sumner. From the description in those conveyances, it appears that the orientation of the Northern boundary is the salt pond which boundary is actually the eastern or northeastern boundary in the Commutation. Using the orientation in the conveyances which place the salt pond in the North (as opposed to the east or northeast), the 15.43 acre tract would be situate due south of the salt pond.

[149] Under further cross-examination by Ms. Smith, Mr. Williams stated that the vegetation on Parcel A is different from that on Parcel B.

[150] Mr. Williams further stated that, on the Chee-A-Tow's map, Parcel A is bounded northwardly by the Forsyth, easterly by C.R. Nesbitt, southwardly by Parcel B and westerly by W.F. Dorsett. Parcel A is a square and Parcel B is a triangle. He opined that, by 1970, there were changes to the Southwestern boundary, which resulted in the creation of a salt pond and a large sand dune above the high-water mark.

Mr. Thomas Ferguson

[151] At the time of the hearing of this Petition, Mr. Ferguson was the Acting Surveyor General of The Bahamas country and was charged with the duty of directing and controlling all surveys for public purposes. He is a Registered Surveyor. He holds a Diploma in Surveying and Cartography from De Havilland College, Hertfordshire, England which he attained in 1991. He has performed geodetic control surveys for the Sommerset County Council (1989-1991). He also holds a Bachelor of Science Degree (Hons.) in surveying and mapping sciences from the University of East London in 1995.

[152] Mr. Ferguson has a wealth of experience in cartography and map-making and can produce maps by the photographic process. He has experience in photogrammetry, photo interpretation, analysis of coasts, coastal erosion and vegetation. He has created orthophotos using the B2-52 Stereo Plotter, SD2000 Digital Plotter, Now Processing Software using high powered computers with high end processors and high end graphic cards. Thus, he is experienced in interpreting and producing aerial photography from the older systems right up to up to date systems.

[153] Mr. Ferguson also has experience and training in hydrographic surveying and has secured the necessary equipment to allow the Lands & Survey Department to produce new mapping of the sea bed. He has also written a Paper titled "Land tenure in The Bahamas – Progressing towards the year 2000".

[154] Last but not least, Mr. Ferguson, had on numerous occasions, be deemed an expert witness in surveying. Mr. Eneas vehemently objected to Mr. Ferguson giving opinion evidence as to the likelihood of accretion on the basis that he is not an expert in geology or hydrography.

[155] The Court heard submissions from both Counsel and, at the end of the day, Mr. Ferguson was deemed an expert in surveying, mapping, valuation, photogrammetry, geometrics and remote sensing but not in geology and hydrography.

[156] Mr. Ferguson stated that in his capacity as Acting Surveyor General, he caused a survey to be conducted on the Lots. The survey team visited Rum Cay and conducted surveys and found that there was a 16.2 acre tract of land which is Crown land. He stated that this tract of land was not identified on the Plan attached to the Notice. His team traced a total of 96.865 acres of land, of which 80.665 acres are within the Crown Grant found in Plan 65RC. His team also traced 16.2 acres of Crown land clearly defined outside the 80-acre perimeter to the west of the Crown Land reflected in Plan 64RC.

[157] Mr. Ferguson further asserted that his team found Lots 5, 9 and 10 partially within the boundary of the said Crown Grant and partially within the 16.2 acres of Crown Land. Lots 2 and 3 were within the boundary of the 16.2 acres of Crown Land – which is on the foreshore. He was advised that the Crown had issued a licence to the Wahoo Foundation to occupy that land.

[158] In a nutshell, Mr. Ferguson opined that the 15 acres always existed. He asserted that though changes to the land could occur by natural disasters such as hurricanes, it is unlikely that there was natural accretion to the extent necessary to naturally bring about the change that the Petitioners alleged. He also asserted the vegetation near the coastline is of a similar type and density to that inland and the pond near the coast is similar in nature to the inland ponds, which suggests that they would have formed similarly and around the same time.

[159] According to Mr. Ferguson, the topographic map indicates a ridge of 10 feet close to the higher hill at Sumner Point. This ridge would have acted as a natural barrier to hurricanes and sea swells. He stated that he carried out an analysis of a shock and did not locate any meteorological data during the period 1806-1847. Although hurricanes occurred from 1847-2018, they seem to have an instant impact but did not seem to affect the extremely low lying islands as drastically as in other islands of The Bahamas. He said the land is hard land.

[160] After looking at a photograph from 1970, Mr. Ferguson stated that there is evidence of occupation, extending into the 80 acre parcel. He said that the pond does not appear to have been disturbed at all but there is evidence of a road leading to the pond, which shows that the pond would have been in use by the community or by persons at that time. He said that the vegetation is the same as the vegetation inland. He agreed with Mr. Williams that the southwest corner of the 80 acre tract acts as a natural grommet which causes collection of sand in the cove like area.

[161] Mr. Ferguson did not conduct any samples of the composition of the matter or material found in the bay because, according to him, it was not necessary.

Documentary evidence relied upon by the Petitioners to establish accretion.

[162] The Chee-A-Tow Survey in 1977 and his letter dated 21 June 1996 to Tex Turnquest, Deputy Director of the Lands & Survey Department stated that the plan and description in the Commutation formed the basis of the Survey and that the total acreage of the tract surveyed was 95.805 acres in 1977 as a result of what was described as natural accretion.

[163] The Chee-A-Tow Survey Report which was addressed to Robert Little of SPPL referred to a survey which was carried out on 30 September 1977. I quote selectively from the Report where it was stated:

> **"When the rest of the boundaries were set out and pillared, Signal Point fell outside the tract as indicated on the diagram in Book A3**

page 206 and in the C.R. Nesbitt Grant (I Page 104). There is evidence that Parcel B was used as part of the tract as pasture – rock walls and fence posts formed such enclosures."

[164] It is to be noted that the physical location of the 80 acres described in the Crown Grant and the land described in the Commutation are in the same location and occupy the same space. This fact was confirmed by Mr. Chee-A-Tow in his 1977 survey (No. 11 Rum Cay) and re-confirmed by Mr. Roscoe Turnquest in a Minute Paper to the Acting Surveyor General, Mr. Hing-Cheong dated 25 July 2008 wherein he concluded that "*Investigations into the survey plan of Rum Cay reveal that Crown Grant Commutation A[3]-266 for William Sumner is in the correct position and all the distance and angles showing on the plan 11 of Rum Cay are correct. I seek the assistance of Mr. Daniel Wilkinson Senior Surveyor, and after his review of the plan he confirms my finding.*" These findings were later communicated to Ms. Michelle Wells by the Surveyor General in a letter dated 30 July 2008 where he stated "*Thank you for your letter of 21 July, 2008 in connection with survey plan number 11 of Rum Cay, which is on record in the Department. I am to confirm that 80 acre parcel originally granted to William Sumner resurveyed by Chee-A-Tow and Company Ltd, appears to be the same area laid out as shown on the Crown Grant diagram in A.D. 1847*" (i.e. the Commutation).

[165] The Petitioners also relied on a letter dated 22 August 1996 by Loftus Butler, Surveyor General of The Bahamas to the Department of Legal Affairs, informing the Director of Legal Affairs that "*it can only be reasonably concluded that there has been an accretion of land to the south west of the Sea by 15.143 acres*. Mr. Butler concluded the letter in this way:

"This Department is of the opinion that the 15.143 acres of accreted land now forms part of the William Sumner Grant. Under the circumstances however the Department now seeks a legal opinion as to whether the Crown has any interest in the accreted land containing 15.143 acres."

[166] In reply, by letter dated 22 November 1996, Ian Winder, Assistant Counsel in the Attorney General Office advised the Surveyor General that land formed by alluvion or accretion belonged to the owner of the adjoining land. The letter stated:

> **"The general law is that land formed by alluvion or gradual and imperceptible accretion from the sea, and imperceptible retract of the sea belongs to the owner of the adjoining land…The situation would be different if the accretion was not a natural gradual process. In that regard I would advise that you satisfy yourself that the accretion was not deliberate and that in fact accretion has taken place."**[Emphasis added]

[167] Then, there was a letter dated 25 September 2008 from Mr. Harold Hing-Cheong to an intended purchaser, Ms. Michelle Wells of Montana Holdings Ltd, informing her that *"the parcel of land (15.14 acres)(sic) adjacent to the 80 acres which was originally granted to William Sumner is considered a part of that land and not Crown property."*

[168] This was followed by a Memorandum dated 20 October 2008 from the Office of the Prime Minister to the Department of Lands & Surveys, requesting that the strip of land be investigated to determine whether it is Crown land or otherwise.

[169] By letter dated 29 December 2009 from Mr. Hing-Cheong to the Permanent Secretary, Office of the Prime Minister titled "Re: Coastal Strip-Land bordering proposed Marina at Rum Cay, Mr. Hing-Cheong wrote:

> **"The strip of land coloured yellow on the sketch forwarded with your memorandum is not crown property. The parcel of land which was granted to William Sumner was originally bounded on the sea. It appears that accretion has taken place over the years adding sea front to the property which accrues to the owners of the land behind."**

[170] Subsequently, in a Memorandum dated 16 August 2010 from Mr. Audley Greaves of the Office of the Prime Minister, he advised the Director, Lands & Surveys that *"the Minister responsible for Lands & Surveys has considered the view of the Acting Surveyor General. However, the Minister's view is that land accreted from the sea is Crown owned to which the adjacent grantee does not have Title."*

[171] The Memorandum goes on:

> **"Please be also advised that the Minister responsible for Lands & Surveys agree to sale of the 15.43 acres to Sumner Point Properties Ltd at market price."**

[172] Mr. Eneas submitted that when one considers the history of the matter as set out in the chronology in the Minute Paper dated 7 March 2014 prepared by Ralph Brennen, it is clear that the Crown's current position regarding its alleged ownership of Parcel B is the result of political decision or agenda and not based on any facts or scientific evidence.

[173] The circumstances giving rise to the change in the government's position was explored during the cross-examination of Mr. Ferguson. When asked whether there was anything in the chronology which would have given the Minister reason to change or take a different view, Mr. Ferguson said: *"Well, this actually is – I can say from the paper, I don't see anything here that shows that the view – there was some reason for the view that was initially received from him to change because his report was the same that he presented initially."*

[174] Mr. Eneas submitted that the Crown now resiles from its previous position that Parcel B is comprised of accreted land and purports to support its position with the opinion of Mr. Ferguson whose conclusions were formed having regard to essentially the same evidence and data likely utilized by his predecessors and others including Mr. Chee-A-Tow, Mr. Hubert Williams and Mr. Hing-Cheong to arrive at his contrary conclusions.

Evidence refuting the Petitioners' allegation of accretion

[175] The Crown argued that Mr. Chee-A-Tow in his 1977 Survey and his filed plan No. 11 never stated that Parcel B (15 acres) was accreted land. Instead, says the Crown, Mr. Chee-A-Tow attributed co-ordinates to the said Parcel B, as solid land which was always a part of the land formation.

[176] Ms. Smith submitted that the concern about whether or not the land was accreted or not was not presented until after the sale of the Lots to the Petitioners in 1994. In 1996 Mr. Chee-A-Tow wrote Mr. Tex Turnquest asking about the 15 acres and suggested natural accretion.

[177] Ms. Smith further submitted that Mr. Williams referred to solid land which protrudes along the Southwestern boundary of the land. In **his Witness Statement filed herein 22 February, 2019** at paragraph 10, Mr. Williams stated that ***"It is noted that a small portion of the Southwestern boundary is bounded by what appears to be small protrusion or a bluff which is situated outside of the tract. This protrusion or bluff is in my opinion important as it would have contributed to the accumulation of the sand deposits referred to…."***

[178] Ms. Smith argued that Mr. Williams stated that this Southwestern boundary of the Commutation, which was a protrusion of land, would have contributed to the accumulation of sand deposits. He did not say that this protrusion was sand deposits and neither that it was created from sand deposits. He said that it contributed to the accumulation of sand deposits.

[179] Mr. Williams in his evidence spoke of this protrusion as being a part of the Southwestern boundary of the Commutation; at paragraph 23 of his witness statement, Mr. Williams stated that **"***based on my professional experience and using the plan on the Commutation as the starting point for the location of the 80 Acres Tract and the Southwestern boundary; the extent of the obvious changes to that boundary could, in this region, only have reasonably then been caused by the processes of 'alluvion' or 'accretion' or possibly a combination of both in cycles…."*

[180] Ms. Smith submitted that, exhibited to Mr. Hubert Williams' Witness Statement is a letter from Tex Turnquest, Valuation Surveyor, which states that Mr. Turnquest has done a site inspection at Rum Cay in 1994 and found that Sumner Point Properties Limited was in the process of establishing a marina by making use of the existing pond. In this regard they have excavated to a depth of 7' to 8' and

near the northern tip of the pond they have excavate 200' long, "this is incomplete and silting has begun to take place near the entrance".

[181] According to Ms. Smith, Mr. Tex Turnquest walked the land and based on his letter dated 26 May 1994, he would have seen excavation of the pond, which was located on this 15 acres tract of land. He would have also seen silting taking place near the entrance to this pond; as the excavation of a depth of 7' to 8' would have meant that the excavators would have placed the fill which they dug up on the land near to the excavation.

[182] Ms. Smith further submitted that Mr. Turnquest adequately demonstrated that **if** there was accretion, it was man-made from the excavation of the pond on Parcel B.

[183] The Crown also relied on the evidence of Mr. Cummings who testified that there was accretion which was man-made from the excavation of the pond on the land. Mr. Cummings detailed in his evidence the activities of Robert Little Jr. in diggings and creating land in the area of the pond within the Crown land. I should emphatically state that, having had the opportunity of seeing, hearing and observing the demeanour of all the witnesses who testified before me, I did not find Mr. Cummings to be a credible witness. I took his evidence with a grain of salt since he has an ongoing dispute with Mr. Little. In other words, he has an axe to grind having built his marina on the disputed land.

Analysis

[184] There is a wealth of documentary evidence from as early as 1996 where highly qualified surveyors in the Department of Lands and Surveys had expressed that the 15-acre tract (Parcel B) was accreted land. That was the consensus. It was not until 2008, after the Department made it clear that the 15 acre tract was part of the William Sumner Grant and not Crown land that the Office of the Prime Minister arrived at a contrary position with really no evidence. This is difficult to digest especially having regard to the fact that the opinion was expressed by several

highly qualified surveyors, who had no interest in the land or no axe to grind. By Mr. Ferguson's evidence as to the development of the tract by 1970, he is asking the Court to draw the inference that the tract was always there. However, the period between the William Sumner Grant and 1970 (when the photograph was taken) is nearly 170 years, which is a long period of time within which the changes asserted by the Petitioners could have occurred.

[185] Although Mr. Ferguson's opinion was that the extent of the accretion was unlikely, he agreed with Mr. Williams that the southwest corner of the 80 acre tract acts a natural grommet, which causes sand to collect. Further, in 1977, when Mr. Chee-A-Tow conducted his survey and wrote his report, he was of the view that the land had been accreted.

[186] Mr. Ferguson also asserted that his team found Lots 5, 9 and 10 partially within the boundary of the said Crown Grant and partially within the 16.2 acres of Crown Land. Lots 2 and 3 were within the boundary of the 16.2 acres of Crown Land – which is on the foreshore.

[187] This bit of evidence demonstrates that accretion is still taking place for the acreage to increase to 16.2 acres from its initial 15 acres. Also, when the Court visited the locus in quo in September 2021, there was evidence of accretion taking place.

[188] For all of these reasons, I prefer the expert evidence of Mr. Williams to that of Mr. Ferguson. On a balance of probabilities, I find the Parcel B was accreted land formed by natural accretion.

[189] I could end this discussion here but, in the event that I was wrong to come to these conclusions, I shall carry on.

Proprietary estoppel

[190] The Petitioners submitted that if the Court determines that notwithstanding the above submissions, the Crown is vested with title to or an interest in the Lots, the Crown is estopped from asserting its strict legal rights to ownership having regard

to its conduct during the period 1977 (the year of the 1977 Survey) to the commencement of these proceedings.

[191] The doctrine of propriety estoppel as expressed in **Gray's Elements of Land, 4th ed.** at page 947 para 10.169 and page 949 para 10.173 where it is stated as follows:

> Page 947:
>
> "**10.169 The central concern of the doctrine of proprietary estoppel is the notion of conscientious dealing in relation to land. The doctrine has been explained as having its root in 'the first principle upon which all courts of equity proceed', that is, 'to prevent a person from insisting on his strict legal rights - whether arising under a contract, or on his title deeds, or by statute – when it would be inequitable for him to do so having regard to the dealings which have taken place between the parties.' Estoppel doctrine dictates legal entitlement cannot be enforced in total isolation from the relational context in which relevant dealings have taken place. Accordingly the law of proprietary estoppel confers on the courts a residual power to scrutinize and to restrain (or estop) particular assertions of legal entitlement on grounds of conscience.**"
>
> And at page 949:
>
> "**10. 173 The law of proprietary estoppel operates where the owner of an estate in land has expressly or impliedly given some informal assurance respecting present or future rights in that land. The doctrine of estoppel restrains that person from any unconscientious withdrawal of his representation if the person to whom it was made has meanwhile relied upon it to her own disadvantage. The primary inquiry for the court is whether it is conscionable for the representor to deny that which he has allowed or encouraged the representee to assume to her detriment. In this way estoppel doctrine finds its ultimate purpose in 'enabling the courts to do justice.**"

[192] According to the Petitioners, in 1977, the Crown was fully aware of the occupation of Parcel B by SPPL's Petitioners' predecessor in title). This is evidenced by the letter dated 21 June 1996 from Mr. Chee-A-Tow to Mr. Tex Turnquest of the Department of Lands and Surveys in which he recites the events leading up to the recording of the 1977 Survey including the acceptance of his findings on the issue of accretion. Between 1977 and May of 1994, no steps were taken on behalf of the Crown to contest or otherwise challenge Mr. Chee-A-Tow's conclusions. In

the absence of any objection, SPPL proceeded to develop Parcel A and Parcel B by subdividing the property into lots which were sold to purchasers including the Petitioners' predecessor, Mr. Orlando who acquired Lot 2 on 28 September 1994.

[193] In the Minute Paper No. 37 from Mr. Tex Turnquest to the Acting Deputy Permanent Secretary dated 26 May 1994, Mr. Turnquest states as follows in the penultimate paragraph:

> **"Further research has also raised doubts as to the legitimate owner/s of the land in occupation by the company (i.e. parcel "B" on the attached diagram annex 2). This was deduced having regard to a boundary description of the original grant to William Sumner in 1806. It was indicated thereon that land fitting the location and amount as that of parcel "A" (see diagram annex 2 attached) is bounded to the west by Crown Land. However, the property was commuted in 1847 and the boundary description indicated that the land concerned was bounded to the west by the sea. You will note that the land to the west is parcel "B" and amounts to 15.143 acres. It is also the land in occupation by Sumner Point Properties."**

[194] It is abundantly clear from this Memorandum that, as of May 1994, the Crown was fully apprised of the alleged boundary dispute.

[195] In a further Memorandum from Mr. Dwight Watkins, Survey Technician, to Tex Turnquest also dated 26 May 1994, it is stated:

> **"The property in question is located at Sumner Point, Rum Cay and I found great difficulties in determining the ownership of the pond.**
>
> **The original grant to William Sumner in 1806 shows that the western boundary of the property is bounded by crown land, however, the property was commuted in 1847 again to William Sumner and this shows that the property is bounded on the west by the sea.**
>
> **Personally, I feel that the description on the commutation is a mistake and should have read "by the pond".**
> **This is a problem which will have to be resolved by the Legal Department but my feeling is that we may have to live with this mistake and acknowledge that a mistake was made with this description. Only then can we begin proceedings to rectify the problem.**
>
> **It is too large a tract of land (15.1 acres) to allow to go uncontested and the pond referred to is located within this tract."**

[196] The Petitioners submitted that notwithstanding the Crown's knowledge of the matters relative to the alleged boundary dispute, no steps were taken by the Crown to inform Mr. Orlando of its position regarding its potential interest in Parcel B.

[197] Instead of advising Mr. Orlando of the Crown's position regarding the ownership of Parcel B, a Certificate of Registration under the International Persons Landholding Act, Ch. 140 was issued to Mr. Orlando to acquire Lot No. 2 on 3 February 1995. Similarly, the Investment Board issued a permit for the acquisition of Lots 3, 9 and 10 on or about 1998 and Lot 5 on 14 November 2007. Additionally, the Petitioners have paid and the Government of The Bahamas has received Real Property Taxes in connection with each of the Lots.

[198] In light of the fore-going, the Petitioners argued that it would be inequitable for the Crown after having approved the transactions for the acquisition of the Lots and after having collected real property taxes from the Petitioners to now seek to assert an interest in the Lots to the detriment of the Petitioners. For this reason, the Petitioners argued that the Crown is now estopped from asserting or enforcing any title to any portion of the Lots.

[199] I agree that the Crown is estopped from asserting its strict legal rights to ownership having regard to its conduct during the period 1977 (the year of the 1977 Chee-A-Tow Survey) to the commencement of these proceedings.

Whether William Sumner Crown Grant escheated to the Crown

[200] Learned Counsel Ms. Smith submitted that the land the subject matter of the William Sumner Grant escheated to the Government because there is no evidence which shows that William Sumner and Mena Letitia Sumner, died possessed of the land described in the William Sumner Crown Grant.

[201] Mr. Eneas QC correctly submitted that this contention by the Crown appears to be an afterthought and is at variance with the position advanced by the Crown during the trial which was based on a claim to only those portions of the subject property

situate on Parcel B, it being argued by the Crown that Parcel B was ungranted Crown land.

[202] Notwithstanding, the Petitioners submitted that the Crown's claim alleging that the William Sumner Crown Grant escheated to the Crown is fatally flawed and untenable bearing in mind the following clear and unequivocal facts:

1. William Sumner (the Crown Grantee) owned and occupied the Commuted Land;

2. William Sumner was married to Rachel Sumner;

3. William Sumner predeceased Rachel Sumner;

4. Rachel Sumner purchased the coastal 20 acres of the Commuted Land on 19 June 1860 from the Provost Marshal. Parcel B adjoins the coastal 20 acres;

5. In a subsequent conveyance on 11 July 1860 from Rachel Sumner to Eliza Taylor in trust for Lennox Elgin Forsyth (a minor), Rachel Sumner is described as owning the land North of the 5 acres parcel being conveyed to Eliza Taylor which land formed a part of the remaining 60 acres of the 80 acres William Sumner Grant;

6. Rachel Sumner died in 1905 leaving her eldest son Peter James Sumner who inherited her property;

7. Any property vested in Rachel Sumner including the remaining 15 acres of the coastal 20 acres acquired by Rachel Sumner was automatically vested in Peter James Sumner after her death;

8. Peter James Sumner married Lettissa Heptbourn aka Mena Letitia Sumner in 1910;

9. After Peter James Sumner's death in 1936, all of his property both real and personal was willed to his wife, Mena Letitia Sumner. In her affidavit dated 11 February 1954, Mena Letitia Sumner deposes to have inherited the land comprising 75 acres from her late husband who acquired the property from his mother Rachel Sumner;

10. The Affidavit of Susan Ellen Bain dated 11 February 1954 also deposes to Peter James Sumner inheriting the 75 acres from his mother (Rachel Sumner) in or about 1905 and that Mena Letitia Sumner inheriting that property from her husband;

11. The Conveyances from Mena Letitia Sumner, Evelyn Remilda Kelly and Castella Rachel Kelly conveying their interest to Carl John Heyser, Jr. in 1954 all contain the same description in the parcels;

12. All of the conveyances subsequent to the conveyance to Carl John Heyser Jr. leading to the conveyance to H & M Corporation (now SPPL} use the same description for the property conveyed. By reason of the afore-mentioned matters, there can be no doubt as to the property that Mena Letitia Sumner believed she inherited and what property she conveyed to Carl John Heyser Jr. as they are one and the same.

[203] As the Petitioners properly submitted, all these matters establish that the relevant part or portion of the 80 acres William Sumner Grant, being the coastal 20 acres, was purchased in 1860 by Rachel Sumner following her husband's death. There is also ample evidence that the remaining 60 acres of the 80 acres William Sumner Grant being owned by Rachel Sumner. The evidence also supports the contention that Peter James Sumner was the heir-at-law of Rachel Sumner and that Mena Letitia Sumner inherited 75 acres of land known as "Sumner Point" which was subsequently sold to Carl John Heyser Jr. These facts are recorded in documents over 20 years old and there is no evidence to dispute their accuracy.

[204] Moreover, the doctrine of escheat is governed by the Escheat Act, 1871 which was operative until 2022 when it was repealed by the Inheritance Act, 2002. It is a fact that the operation of the doctrine of escheat is not automatic and requires an order of the court under the provisions of the Escheat Act before an escheat can take effect: see **Cunningham v Broadcasting Corporation of The Bahamas** SCCivApp & CAIS No. 168 of 2014 where Isaacs JA held:

> **"Escheat was a process which, from 1965 until its abolishment, ensured that land was never without an owner. The right to escheat arose and was vested in the Crown as soon as one died intestate without heirs as, prima facie, there was no owner of the land. The**

> **escheat process was a mere formality to ensure that there was in fact no owner of the land described. Moreover, notwithstanding the right to escheat, the Crown could only enjoy the property as beneficial owner after an escheat had been ordered. That was the purpose and effect of escheat, it was an investigation into the title to land and any order made attached to the land itself and not to the name for which the application to escheat was published."** [Emphasis added]

[205] The Court of Appeal clarified the law that there can be no beneficial ownership of escheated property by the Crown until after an investigation has been conducted by the Court. In the present case, the Crown did not adduce any evidence to show that there was an order of the Court declaring the title to the 80 acres William Sumner Grant as having escheated to the Crown.

[206] In the circumstances, the submission by the Crown alleging that the property escheated to the Crown is hopeless and unsustainable.

Conclusion

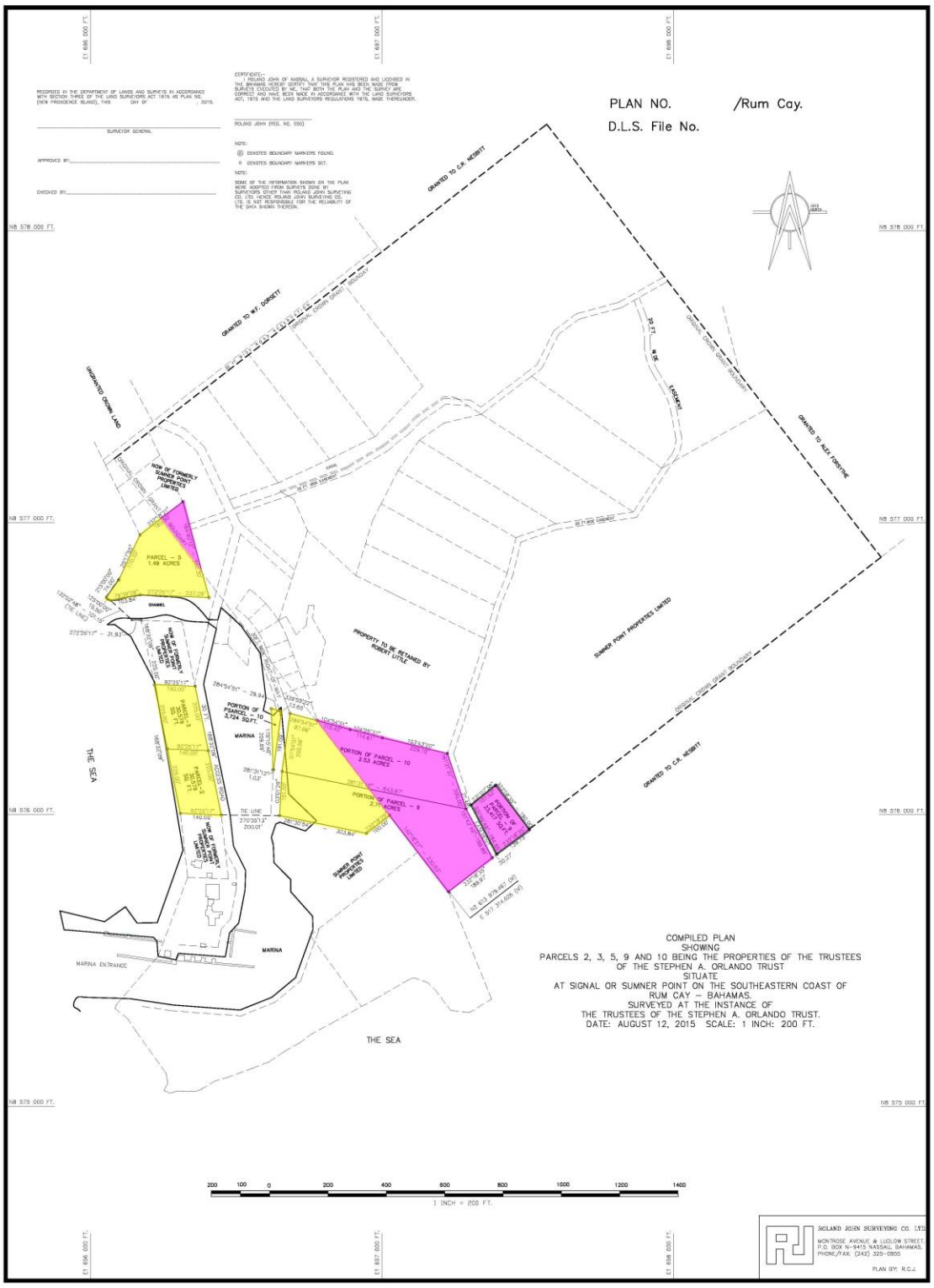
[207] For all of the reasons stated above, I find that the Petitioners are entitled to a Certificate of Title to all those pieces parcels or lots of land situate at *"Signal Point"* also known as *Sumner Point"* on the Island of Rum Cay and designated Lots 2, 3, 5, 9 and 10.

[208] For the avoidance of doubt, I enclose a plan which is not registered but which I believe, would be helpful for illustrative purposes. It was submitted by the Petitioners to demarcate the approximate areas within the two parcels (see plan attached to the Judgment).

[209] If the parties do not agree on costs, I will invite them to lay over written submissions within 21 days from today. I will briefly hear Counsel on 1 June 2022 at 2.30 p.m.

Dated this 20th day of April 2022

Indra H. Charles
Justice


PLAN NO. /Rum Cay.
D.L.S. File No.
GRANTED TO C.R. NESBITT
GRANTED TO W.F. DORSETT
GRANTED TO ALEX FORSYTHE
UNGRANTED CROWN LAND
PARCEL – 5
1.49 ACRES
PROPERTY TO BE RETAINED BY ROBERT LITTLE
SUMNER POINT PROPERTIES LIMITED
PORTION OF PARCEL – 10
2.53 ACRES
PORTION OF PARCEL – 9
2.71 ACRES
PORTION OF PARCEL 10
3,724 SQ.FT.
MARINA
MARINA ENTRANCE
THE SEA
TIE LINE
20 FT. WIDE EASEMENT
COMPILED PLAN
SHOWING
PARCELS 2, 3, 5, 9 AND 10 BEING THE PROPERTIES OF THE TRUSTEES
OF THE STEPHEN A. ORLANDO TRUST
SITUATE
AT SIGNAL OR SUMNER POINT ON THE SOUTHEASTERN COAST OF
RUM CAY – BAHAMAS.
SURVEYED AT THE INSTANCE OF
THE TRUSTEES OF THE STEPHEN A. ORLANDO TRUST.
DATE: AUGUST 12, 2015 SCALE: 1 INCH: 200 FT.
1 INCH = 200 FT.
ROLAND JOHN SURVEYING CO. LTD.
MONTROSE AVENUE & LUDLOW STREET
P.O. BOX N-9415 NASSAU, BAHAMAS.
PHONE/FAX: (242) 325-0800
PLAN BY: R.C.J.